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MICHAEL RODAK, JR.

In the

Supreme Court of the United States

JANUARY TERM, 1973

No. 72-1137

The City Of New Haven,
Petitioners,
v.
The Town Of East Haven, et als.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

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JANUARY TERM, 1973

No.

THE CITY OF NEW HAVEN,
Petitioners,
v.
THE TOWN OF EAST HAVEN, ET ALS.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, the City of New Haven, respectfully prays that a writ of certiorari issue to review the judgment, without opinion, of the United States Court of Appeals for the Second Circuit entered in this proceeding on November 22, 1972.

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals, as yet unreported, appears at Appendix A, infra pp. 1a to 8a. The opinion of the United States District Court, District of Connecticut is reported at 331 F. Supp. 358 16 (S.D.N.Y. 1971) and the supplemental opinion of said District Court is reported at 333 F. Supp. 338 (S.D.N.Y. 1971).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on November 22, 1972. This Court's jurisdiction is invoked under United States Code Title 28 Section 2101(c).

QUESTIONS PRESENTED

1. If in fact and in law there is an inverse condemnation, is the taker of overflight easements the operator of the airport, the Federal Aviation Administrator, or the airlines; and is the analogy of the bridge and its approaches basis for legal liability, or should the dissents by Justices Black and Burton be adopted?

2. Whether this Court in *United States* v. *Causby*, 328 U.S. 256 and in *Griggs* v. *Allegheny County*, 369 U.S. 84 requires substantial diminution of market value by frequent, low, noisy overflights in superadjacent airspace *above* the plaintiffs' land or may 6-12 flights per day over *contiguous* property which result in consequential damages, provide the basis for inverse condemnation, and if the latter is so, is the case of *Richards* v. *Washington Terminal Co.*, 233 U.S. 546 (The basis for *Causby*) overruled?

3. (a) Does the following allegation in the complaint, absent diversity of citizenship, invoke federal jurisdiction when it is the only jurisdictional allegation:

> "33. In addition, the defendant, acting under color of state laws, grants and licenses, have deprived the plaintiffs of their rights and privileges guaranteed by the laws and constitution of the State of Connecticut, in violation of the plaintiffs' Fifth and Fourteenth Amendments to the Constitution of the United States."

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(b) Does Title 28 U.S.C. Section 1331 require that the matter in controversy exceed $10,000.00 in addition to interests and costs so that when it appears with "legal certainty" the plaintiffs' claim cannot attain that amount, must the Court dismiss the complaint?

4. Does the trial court's adoption of a diminution of value formula, the basis for which was unknown to the appraiser so testifying, constitute an unconstitutional taking of the defendants' property when there is no other evidence of diminution of value?

5. Does the requirement of certainty of judgment permit the Court to grant an undefined easement running in favor of the defendants and against the plaintiffs to cover flights over land contiguous to the plaintiffs'?

6. After the trial of a case on the merits and more than six months after briefs are filed, does the Court have authority to order "a supplemental hearing as to damages only" when the question of liability and damages are inextricably intertwined?

STATEMENT OF THE CASE

The facts relevant to the questions presented by this petition are uncontrovertial and, therefore, may be introduced to the Court in a summary fashion, and references herein are to the opinion unless otherwise denoted.

Thirteen plaintiffs sued Eastern and Allegheny Airlines and the Federal Aviation Administrator in U. S. District Court for the District of Connecticut asking for money damages and asking an injunction prohibiting turbo-prop and jet aircraft from taking off and landing at Tweed-New Haven Airport, the title of which is owned by the petitioner and which airport physically is located in both East Haven and New Haven. The Federal Aviation Administrator successfully moved to have the suit dismissed as to him on jurisdictional grounds. At the urging of the Court, the petitioner herein, the City of New Haven, was cited in as an additional defendant, and three motions to dismiss filed by the petitioner were denied. *Town of East Haven et al* v. *Eastern Airlines et als*, 282 F. Supp. 507 (D. Conn. 1968). The plaintiffs claimed a violation of State, Constitutional and Statutory rights which resulted in an inverse condemnation.

After a trial in October of 1970 and the filing of briefs in December of 1970 the Trial Court on July 31, 1971 found for the defendant airlines on all counts, found for the petitioner as against six plaintiffs, and found there was a partial taking as to seven plaintiffs, but as to these plaintiffs the Court found they failed in their proof of damages, but it ordered a supplemental hearing as to damages only as to these plaintiffs, and that hearing took place October 18, 1972. The short testimony as to damages is printed in its entirety as the petitioner avers that as a matter of law the formula method employed by the appraiser is insufficient to compute money damages. (App. pp. 9a-73a)

The City has owned the entire airport, one-half of which is located in East Haven, since 1290. The City of New Haven has no right to condemn property in East Haven for airport purposes. *East Haven, et als* v. *New Haven, et als*, 159 Conn. 271 A.2d 110 (1970). Every flight and every aspect of every landing and take off at the airport is under the direction, control, and jurisdiction of the Federal Aviation Ad-

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ministrator along with the Civil Aeronautics Board; thus, the United States government so controls aviation that a pilot cannot even board a plane without F.A.A. approval. The City has no legal power to stop any flight from landing or taking off as that power is exclusively in the Federal Government.

There was no evidence of, and the Court did not find that airplanes passed through superadjacent airspace over the real property owned by any of the plaintiffs (pp. 17, 21, 22, 24, 26, 54) but rather the Court found that the planes were over property near that of the plaintiffs. There were 6-12 flights per day and all flights complied with F.A.A. regulations. (Opinion pp. 11, 13, 36-39) There is currently a temporary mandatory injunction affirmed by the Second Circuit Court of Appeals requiring the City to keep its runway open to the distance of 4,370 feet. The Court found normal real estate activity and no mass exodus of residents. (pp. 57, 58). No plaintiffs were sick, none sold their homes at a loss, none failed to acquire financing, all testified that their property had increased in value and that the neighborhood has been stable. Most had improved their property since the advent of turbo jets.

The District Court found at the end of the case in chief that the plaintiffs had failed to prove damages and that it could dismiss the case because of that; the Court nevertheless allowed a supplemental hearing as to damages only. (Opinion p. 58) The only evidence then, because the Court, a fiori, found it needed expert evidence to compute damages, took place at the supplemental hearing. The only evidence as to damages consisted of the use by plaintiffs' appraiser of a formula which he read about in a journal and about which he talked to the author once on the telephone. (App. pp. 37a, 38a) The expert admitted he knew nothing of the airport which was the alleged basis of the formula, he did not know the type of planes involved, the number of planes per day, the type of property they flew over, the number of engines the planes had, the time of the flights, and yet this assessment of damages was applied verbatum by the Court. And this formula was used by the Court despite the appraiser's admission that the advent of jet aircraft had appreciated the properties surrounding O'Hare Airport in Chicago. Lastly the appraiser testified the only property which was sold after the date of the taking, sold for its pre-taking value, therefore disproving the formula.

On November 22, 1972 the Court below affirmed the judgment of the District Court.

REASONS FOR GRANTING WRIT

I. If In Fact And Inlaw There Is An Inverse Condemnation, Is The Taker Of Overflight Easements The Operator Of The Airport, The Federal Aviation Administrator, Or The Airlines: And Is The Analogy Of The Bridge And Its Approaches, Basis For Legal Liability, Or Should The Dissents By Justices Black And Burton Be Adopted?

The only two cases decided by this Court, *Griggs* v. *Allegheny County*, 369 U.S. 84 and *United States* v. *Causby*, 328 U.S. 256, state that frequent, low, noisy, overflights which destroy or substantially reduce the value of property constitute a taking by the operator of an airport, although in *Griggs* one

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of the three prospective defendants (the airlines) was not before the Court as they were dropped as a defendant in State Court proceedings. The plaintiff had the option to proceed under trespass or taking, and Griggs chose the taking theory releasing the airlines (see *Gardner* v. *County of Allegheny*, 353, Pa. 120, 124, 142 A.2d 187, 192 (1958), *Griggs* v. *Allegheny* 402 Pa. 411, 168 A.2d 133 (1960). In *Causby* the airlines were not a defendant because the operator of the airport and the aircraft was the same, the United States Government.

In *Causby*, a 6-2 decision, the legal question of whom is taker was never in issue as the government, being both the operator of the airport and the operator of the aircraft never presented this problem. Therefore, the only case addressing itself to this problem is *Griggs*, and as was pointed out in the preceding paragraph, the airlines (the operator of the aircraft) were not a party to the suit, nor was the Federal Aviation Administrator, the regulator of navigable airspace.

At pages 89 and 90 of *Griggs* this court rationalizes why the promoter, owner and lessor of the airport is the taker, in the Constitutional sense, of the air easements. This Court held, subject to the approval of the Federal Aviation Administrator, the owner determines where the airport would be built, what runways it will need, their directions and length, what land and navigation easements would be needed. That sentence unfortunately argues the conclusion — the owner does not need an easement — it only needs a runway which is accessible to aircraft — for example, if the owner of blackacre at the end of a runway located in another city attempted to erect a radio tower, it would not be the owner of the airport but the Federal Aviation Administrator who would be the only one who could compel its destruction or obtain an injunction against its erection. *United States of America* v. *City of New Haven, et als,* 447 F.2d 972 (2nd Cir.)

This Court correctly commented at Page 85 of *Griggs*, that the entire operation of airplanes, from the inserting of the key in the ignition to the permission required to take off and land is peculiarly in the absolute control of the F.A.A. If the F.A.A. approves an airport and contributes funds for its construction, and if at a later date there is a "taking" case, there is no more reason, because of a grant agreement, to hold the operator liable then to find the Federal Aviation Administration liable. That is so because it is the Federal Aviation Administrator who, by Statute (Title U.S.C. 1108(d)), must be satisfied so as to approve any project with respect to any airport. Therefore, if the caretaker of the airspace, the Federal Aviation Administrator, has approved flights in and out of an airport, it is he, by approving, allowing and encouraging such flights, who should be held liable for a taking or an inverse condemnation, for it is under the public's right to travel that Congress has granted the Administrator such all encompassing power. *Causby* stands for the proposition that the United States Government should be liable for a taking. *Griggs* did not have the actual trespassers, the airlines, as defendants in the case because *Griggs* chose not to proceed in trespass under Pennsylvania law, and therefore, this Court held the owner liable on a taking theory based upon a breach of a constitutional duty to acquire sufficient real estate so that the clear zones are over the fee owned by the operator. Further, the Court analogized that the governmental owner of an airport is likened to the governmental owner of a bridge which would not be a usable facility unless the government owned at least an easement over the land necessary for the ap-

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proaches to the bridge. That is precisely the position this petitioner has taken — with one notable exception which was missing from the analogy of the bridge, and which makes the case of an airport and its clear zones even stronger than that of the bridge and its approaches. That is Congress has not seen fit to place the entire road system, from the insertion of the key in the ignition of a car through the absolute control of the time and direction of movement of the cars, within a governmental agency; therefore, even if the statement by this Court that a county which built a bridge and which county did not acquire highway easements approaching the bridge would be guilty of a taking (it would not), the fact and law of the matter is that the owner of the airport is powerless to prevent airlines from using the airport — that is in the peculiar, exclusive control of the Federal Aviation Administrator. It is clear that the Court cannot order the City to shut down the airport because of Title 49 Sec. 1101 et. seq. and if the Court cannot order it, the City certainly cannot unilaterally refuse the airlines (the public in its right to travel) the right to land and take off. Therefore, the owner of an airport is without a legal remedy to avoid the consequences of the holding which makes the owner the taker.

Further, the analogy of the bridge and its approaches is faulty. Suppose the City of New Haven built a bridge in New Haven which had its terminus abutting a playground in East Haven. Suppose further a car traversed the bridge and entered the playground. That is not a "taking" by New Haven. The operator of the car has committed a trespass, but the owner of the bridge has committed no wrong as to the owner of the playground. This Court so held, by analogy in

Causby when it affirmed the holding of *Richards* v. *Washington Terminal Company*, 233 U.S. 546.

It is equally obvious that the operator of the aircraft commits the trespass; in the supposed case the trespassers are Allegheny and Eastern Airlines, which are public carriers operating under authority and direction of the Civil Aeronautics Board and the Federal Aviation Administration, both of which function to satisfy the right of the public to travel.

Therefore, it is inescapable that the public is the logical one who takes and therefore, the logical one to pay for a "taking" if the Courts are going to enter judgments based on "taking". The remedy in a "taking" case should be the right of the property owner to recover from the F.A.A. and thus all of the public who have the right to travel would pay for that right. The alternative is to hold the air carriers liable as they, once again with the permission of the Federal Government, may increase prices to obtain money to pay for the taking, and thus that portion of the public which travels will pay for the right.

If the operator of the airport must pay, it not only has no basis in law because of the fallacy of the bridge analogy, but it is grossly unfair to the already overburdened city property tax will be adversely affected again; the National Airport Plan will be thwarted as no city, or county will open airports, and the result, country-wide, will be that reaction of Los Angeles — close the airport.

This Court should find no taking or if a taking is found, the taker should be the United States Government.

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II. WHETHER THIS COURT IN *United States* v. *Causby,* 328 U.S. 256 AND IN *Griggs* v. *Allegheny County,* 369 U.S. 84 REQUIRES SUBSTANTIAL DIMINUTION OF MARKET VALUE BY FREQUENT, LOW, NOISY OVERFLIGHTS IN SUPERADJACENT AIRSPACE ABOVE THE PLAINTIFFS' LAND OR MAY 6-12 FLIGHTS PER DAY OVER CONTIGUOUS PROPERTY WHICH RESULT IN CONSEQUENTIAL DAMAGES, PROVIDE THE BASIS FOR INVERSE CONDEMNATION, AND IF THE LATTER IS SO, IS THE CASE OF *Richards* v. *Washington Terminal Co.,* 233 U.S 546 (THE BASIS FOR *Causby*) OVERRULED?

The decision below directly conflicts with the only two "taking" cases decided by the United States Supreme Court, *United States* v. *Causby*, 328 U.S. 256 and *Griggs* v. *Allegheny County*, 369 U.S. 84.

A.

Overflights

In *Causby* this Court analyzed the 1914 case of *Richards* v. *Washington Terminal Company*, 233 U.S. 546 and concluded the principle that a transportation system authorized by law and lawfully operated cannot be deemed a private nuisance, and that the result visited upon the plaintiff was not a taking but consequential damages. Justice Douglas carefully distinguished *Richards* by stating at page 262 of *Causby*:

> "In that case property owners whose lands adjoin a railroad line were denied recovery for damage resulting from the noise, vibrations, smoke and the like incidental to the operation of the trains."

In *Causby* this Court further said (328 U.S. at 262),

> "In the supposed case, the line of flight is over the land. And the land is appropriately as directly and completely as if it were used for the runways themselves."

In *Griggs* this Court said (369 U.S. at 87 quoting Judge Bell),

> "Regular and almost continuous daily flights, often several minutes apart, have been made by a number of airlines directly *over* and very, very close to plaintiff's residence."

The Trial Court in its Memorandum of Decision discussed favorably the requirement of overflights and then admitting that, in the Tweed-New Haven Airport,

> "The planes landing and taking off from these runways must have passed so very close to these properties, if not directly over them, as to make it seem like unrealistic nitpicking to deprive these plaintiffs of the *Causby* rule. As a practical matter, these properties were directly affected by the flight." (Page 54, 55)

The Trial Court then cited as its only authority for the lack of overflights the case of *Thornburg* v. *Port of Portland*, 233 Ore. 178 376 P.2d 100 (1962), a case which was sent back for trial, as affects Tweed-New Haven Airport, on the basis that overflights were not necessary for inverse condemnation and *Thornburg* cited as its authority for such a proposition the dissent in the Tenth Circuit Court of Appeals case of *Batten* v. *United States*, 306 F.2d 580 *cert. denied* 371 U.S. 955. At page 104 of its decision *Thornburg* refused to affirm the trial court holding because certiorari was pending before this Court and it expected *Batten* to be overruled. However, the dissent in *Batten* has never been adopted, rendering nugatory *Thornburg* as certiorari was denied. Judge McLean states, at page 50 of his Memorandum of Decision,

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> "Although there is no decision directly binding on one as to how *Causby* and *Griggs* should be interpreted I feel that only cogent reasons should induce one to depart from the great weight of Federal authority in other circuits. I have not found a sufficiently compelling reason to do so."

Then Judge McLean disregarded his own reasons and found that overflights were not necessary and found for the plaintiffs, despite the fact there is not one Federal Court Decision supporting his position, and the only two Supreme Court cases hold to the contrary. The Second Circuit Court of Appeals, in its judgment (App. pp. 1a-8a) did not even comment on the question that overflights are necessary for an inverse condemnation — if they are not, what is the theory of a taking? *Richards,* and therefore, *Causby* and *Griggs* rule out legal nuisance, and in effect the Trial Court has overruled *Causby* and *Griggs* by dispensing with *Richards.*

B.

Frequently Resulting In Damage.

This Court held in *Causby* at page 266,

> "Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."

At Tweed-New Haven the only evidence of low, frequent flights is six to twelve (Opinion Page 10-13), and the height of the flights was "Less than 500 feet" (Opinion Page 55). The Court cited *Aaron* v. *United States,* 311 F.2d 798 Ct. Cl. 1963 and *Jensen* v. *United States,* 305 F.2d 444 Ct. Cl. 1962 as authority for the proposition that these were sufficient flights although at page 55 the Court concluded,

> "Although the question in close, I conclude, in all the evidence, that there was sufficiently direct and immediate interference with these plaintiffs' use and enjoyment of their land to constitute a taking."

Aaron involved 200 flights per day and *Jensen* involved 700 flights per day over the plaintiffs' land — clearly not the 6-12 at Tweed-New Haven.

In *Causby* this Court referred to closeness over the plaintiffs' land or 67 feet above the house; in *Griggs* they were 12 feet over the plaintiffs' chimney. The measurements are important as the small jets and turbo-props not over the plaintiffs' homes in East Haven did not render

> "A valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would limit the utility of the land and cause diminution of value." *Causby* at page 262.

nor do they so affect property so that

> ". . . no home could be built, no tree planted, no fence constructed, no chimney erected. An invasion of the superadjacent airspace will often effect the use of the surface of the land itself." *Griggs, supra* at 88-89.

Tweed-New Haven then does not have chickens killing themselves against the wall (*Causby*), plaintiffs driven from their homes (*Griggs*), banks refusing to mortgage property (*Bacon* v. *United States,* 295 F.2d 1936 (1961), inability to raise chickens (*Aaron* v. *United States,* 340 F.2d 665 (Ct. Cl. 1964), the frequently falling objects and Palls of black smoke (*Jensen* v. *United States,* 305 F.2d 444 (Ct. Cl. 1962) nor the lack of a market for homes.

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III.

(A) DOES THE FOLLOWING ALLEGATION IN THE COMPLAINT, ABSENT DIVERSITY OF CITIZENSHIP, INVOKE FEDERAL JURISDICTION WHEN IT IS THE ONLY JURISDICTIONAL ALLEGATION:

> "33. In addition, the defendant, acting under color of state laws, grants and licenses, have deprived the plaintiffs of their rights and privileges guaranteed by the laws and constitution of the State of Connecticut, in violation of the plaintiffs' Fifth and Fourteenth Amendments to the Constitution of the United States."

The only Statute which plaintiffs claim invokes Federal Court jurisdiction is 28 U.S.C. 1331. This Statute has a two-pronged requirements to invoke jurisdiction — it must exceed $10,000.00 in controversy exclusive of interest and costs and it must have arisen under the Constitution, laws or treaties of the United States.

The only allegation in Paragraph 33 of plaintiffs' amended complaint is that they have been denied rights and privileges guaranteed by the laws and constitution of Connecticut. That is a state wrong which, by the allegation of the wrong, is subject to State Court redress, as no Federal question is involved and obviously there is no diversity of citizenship between two Connecticut towns. The Connecticut State Courts have had aspects of this case before it since 1967. *East Haven, et als* v. *New Haven, et als,* 159 Conn. 453, and the State Court has not hesitated to act, as they are continuing to do at this very moment.

Obviously laws and treaties are eliminated as a jurisdictional basis for 28 U.S.C. 1331 in this case. What allegation shows the Constitutional Requirement? Obviously it is not a Fifth

Amendment taking because it is not the Federal Government that is taking and the Fifth Amendment only applies to the Federal Government in a taking case. There is no allegation that there is a violation of the Fourteenth Amendment because Paragraph 33 expressly states that if the defendants did what they are alleged to have done, this is in violation of the Constitution and laws of the State of Connecticut, and Article I, Section 11 of the Constitution of the State of Connecticut provides no remedy in State Courts. In short, the plaintiffs have pleaded a state constitution and State law violation and they have pleaded they have State Court remedies, which they certainly have, and therefore, the plaintiffs have never pleaded themselves into Federal jurisdiction.

The case of *Mosher* v. *City of Phoenix*, 287 U.S. 29 (1932) erroneously relied upon by the trial court, and not commented on by the Second Circuit Court of Appeals, is directly in point and supports petitioner's claim attacking lack of Federal Court jurisdiction because in *Mosher* it was pleaded that Arizona law *allowed* a taking without compensation, directly the opposite of what East Haven has pleaded here. Further, this Court in *United States* v. *Raines*, 362 U.S. 17 at page 26 (1960) Note 6 points out exactly what the defendant claims here — it does not appear that the State offered no remedy at all to the property owner, and therefore, *Barney* v. *New York*, 193 U.S. 430 1904 although clearly eroded, has not been eroded for the proposition of Note 6 of *Raines*, and there is no Federal Court jurisdiction of the subject matter of this complaint.

(B) DOES TITLE 28 U.S.C. SECTION 1331 REQUIRE THAT THE MATTER IN CONTROVERSY EXCEED $10,000.00 IN ADDITION TO INTERESTS AND COSTS SO THAT WHEN IT APPEARS WITH "LEGAL CERTAINTY" THE PLAINTIFFS' CLAIM CANNOT ATTAIN THAT AMOUNT, MUST THE COURT DISMISS THE COMPLAINT?

The law is clear that unless the Court can say with legal certainty that a plaintiff cannot attain the requisite $10,000.00 jurisdictional amount, the Court must dismiss the case because it has no jurisdiction. *Smith* v. *Maryland Casualty Company*, 292 F. Supp. 358, D.C. La. 1968. Further plaintiffs may not pool their claims to maintain an action. *Dewar* v. *Brocks*, F. Supp. 636, D.C. Nev. 1936 16; *Hahn* v. *Gottlieb*, F.2d 1243, L.A. Mass. 1970, 430. Upon appeal the Appellate Court's first question to the defendants was "Why are you here with $18,000.00 among seven plaintiffs?" That is precisely the point we raised at the trial level, appellate level and raise here. Has there not been a violation of the equal protection clause of the Constitution when, despite the proof, not with legal, but with mathematical certainty, the plaintiffs cannot satisfy the threshold requirement of $10,000.00 damages.

The defendant-petitioner filed 3 motions to dismiss based upon the failure of the plaintiffs to satisfy the jurisdiction requirement of Title 28 Section 1331 (9/21/71, App. pp. 74a-77a) and (App. pp. 78a-87a) supplemental cases of July 31, 1970, (App. pp. 87a-92a) These motions and the answer show with legal and mathematical certainty that from the inception of the case there was no chance for any plaintiff to remotely approach $10,000.00 damages. Volumes 7 and 8 of the Appendix filed in the Second Circuit Court of Appeals, Pages 616a-769a and these pages are devoid of evidence of $10,000.00 damages. At the end of the case in chief it was obvious that the claim of lack of jurisdiction amount still could not be met; (Opinion 58) the formula proved it, and yet jurisdiction was maintained.

There clearly was no jurisdiction under either provision of Title 49, U.S.C. 1331, and the Trial Court should have dismissed the action as the Second Circuit Court of Appeals should have done.

IV. DOES THE TRIAL COURT'S ADOPTION OF A DIMINUTION OF VALUE FORMULA, THE BASIS FOR WHICH WAS UNKNOWN TO THE APPRAISER SO TESTIFYING, CONSTITUTE AN UNCONSTITUTIONAL TAKING OF THE DEFENDANTS' PROPERTY WHEN THERE IS NO OTHER EVIDENCE OF DIMINUTION OF VALUE?

The Trial Court had no legal evidence of damages (diminution of property values) before it. At the end of the trial in chief in October of 1970, and six months after briefs were filed, the Trial Court rendered its Opinion July 31, 1971 which found a "taking" by the operator of the airport, the defendant City of New Haven, but the Court found (Tr. 58),

> "There has actually been a failure of proof on this subject and I could dismiss the plaintiffs' claims for compensation on that ground. To do so seems to me unjust. Accordingly, I will hold a further hearing limited strictly to this question of amount of compensation, at which time both sides may offer further evidence on the subject . . ."

The Court then, a fiori, states that the question of damages is one that the Court could not assess without expert testi-

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mony and, therefore, the Court found that it can assess damages in a supplemental hearing based upon the testimony of an expert and it did not, prior to the supplemental hearing, have evidence of damages. In fact it stated above that it could dismiss the plaintiffs' claims for failure to prove damages. If there are damages, then, they must be found in the supplemental hearing held October 6, 1971, and the only testimony produced by the plaintiffs was that of Heiberger and Nitz which is printed in its entirety in the Appendix as the City claims as a matter of law that evidence is insufficient to assess damages. The reason for this claim is that Heiberger stated, App. p. 45a,

> ". . . essentially our market study in — I shouldn't say 'showed.' It was inconclusive. There were insufficient sales to really come up with a definite study, and sales and resales varied with respect to the average increment in value."

The City avers this proves that the only test used by the appraiser, and therefore, the only test available to the Court (as the Court said it needs expert testimony to assess compensation) was the formula used by Heiberger. The City is not claiming that its appraiser is better than the plaintiffs' — the City is claiming that the record is devoid of admissible evidence of diminution of value, or compensation. The reason for this is that Heiberger admitted he applied a formula, the basis for which he did not know, to the subject airport, which formula he read in a 16-page article (App. pp. 37a, 38a), he talked to the author for twenty minutes (App. p. 38a), he did not know if it was an airfield open to airlines, the formula's basis, but it was a military field (App. pp. 38a, 39a, 40a), he does not know what airfield it covered (App. pp. 38a, 39a), he does not know the name of the airfield, but it was a military field (App. p. 38a), he does not know what year the study covered (App. pp. 38a-39a), he does not know how many flights per day or per year were involved (App. p. 40a), but on cross-examination he thinks it was 60,000 flights per year, when Tweed-New Haven has 3,600 per year and he does not know why the 25,000-foot figure applies (App. pp. 37a, 38a, 60a) and he figured a 2% angle and it should be 3 degrees. Further, and most important, the only property he applied the formula to which was sold was property allegedly with a pre-taking value of $25,000.00 which he said was diminished in value to $22,750.00, but which sold, post taking, for $25,000.00 DISPROVING THE FORMULA. (App. pp. 69a, 70a, 71a)

Therefore, by using the formula the Court has deprived the defendants of property (money) without due process of law in violation of the Fifth Amendment of the Constitution. Further, this Court has held in *United States* v. *Merz*, 306 F.2d 39 (1962) that a formula is not a proper method to assess damages.

V. DOES THE REQUIREMENT OF CERTAINTY OF JUDGMENT PERMIT THE COURT TO GRANT AN EASEMENT RUNNING IN FAVOR OF THE DEFENDANTS AND AGAINST THE PLAINTIFFS TO COVER FLIGHTS OVER LAND CONTIGUOUS TO THE PLAINTIFFS'?

The judgment rendered by the Trial Court

> "That upon payment of the judgments [money damages paid to seven plaintiffs] Defendant City of New Haven will acquire a permanent easement in the properties of these plaintiffs for the operation of a similar number

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> of turbo-prop planes and jet planes of the size and use at the time of the trial."

render the decision void for uncertainty?

In *Watts* v. *Wattle,* (U.S.) 6 Pet. 389, 8 L.Ed. 437 it is a fundamental rule that a judgment should be complete and certain in and of itself, and that the form of the judgment should be such as to indicate with reasonable clearness the decision which the Court has rendered, so that the parties are fixed and so that judgment is susceptible of enforcement in a manner prescribed by law. A failure to comply with this requirement renders the judgment void for uncertainty.

The judgment complained of grants an easement which is not defined as to length, width, height or actual use, and the judgment is devoid of where this easement is to be. The Trial Court granted an easement, and this error is covered in the overflights portion of this petition, over properties that are contiguous to the plaintiffs' properties. How can such an easement be recorded on the Land Records? It cannot be, as the Trial Court has granted an easement which affects not the plaintiffs' land, but other contiguous lands. In short, the City is compelled to pay the plaintiffs for something the plaintiffs cannot grant. Is this "and the land is appropriated as directly and completely as if it were used for the runways themselves?" *Causby,* page 262. In *Causby* itself, page 268, the case was remanded to determine if the easement taken was a permanent or a temporary one, and it is respectfully submitted there is no certainty of judgment in the supposed case and the judgment is void for want of certainty as is shown by error more glaring than the easement problem of *Causby*.

VI. After The Trial Of A Case On The Merits And More Than Six Months After Briefs Are Filed, Does The Court Have Authority To Order "A Supplemental Hearing As To Damages Only" When The Question Of Liability And Damages Are Inextricably Intertwined?

Not one of the "taking" cases reported on a State or Federal level supports the determination that first the trier finds a taking and then he finds how much. From *Causby* and *Griggs* as was covered on pages 11 to 14 herein it was pointed out that there must be a *substantial* diminution of market value. It is axiomatic in a taking case that there must be a substantial diminution of market value and that is what results in the taking. A taking case is not analogous to a negligence case in which the issues of liability and damages may be separately determined, or in a breach of contract case in which the breach may be determined independently of the damages for that breach. The issues, then, are not so distinct and independent from the rest of the case so that they may be tried separately without injustice to the determination of the whole issue, and, therefore, the granting of a separate hearing is fatal.

Twenty-One Mining Co. v. *Original Six to One Mine*, (CCAG. 1921) 265 F. 469; *Gasoline Products Company* v. *Champlin Refining*, (1931) 283 U.S. 494, 498, 499, 51 S. Ct. 513, 75 L. Ed. 1181.

Rule 59 of the Federal Rules of Civil Procedure permits additional evidence after judgment for any one of three reasons — error of fact, or law, or for newly discovered evidence

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— none are present in this case and the Trial Court acted without authority in so ordering a supplemental hearing as to damages only, as the case was tried, briefs were filed and then six months later the Court ordered a supplemental hearing. There is no authority for such a proceeding.

CONCLUSION

This case presents issues posed by numerous similar airports throughout the United States, both in the Federal and the State Court systems and cases are pending in both jurisdictions.

A discussion of the problem is presented in "Airport Easements" 1965 Virginia Law Review Volume 54, page 355 et seq. by Marshall T. Bohannon and in 43 S. Cal. Law Review, Berger, "Nobody Loves an Airport" (1970)

In many diverse sections of the County the question of inverse condemnation has placed severe restrictions on the public's right of travel. In effect this decision will negate the effect of Congressional legislation as Title 49 Section 1101 et. seq. and Title 49 Section 1301 et. seq. will be overcome by municipalities closing down airports by reason of their being responsible for damages caused by the Federal Government through the F.A.A. and by the air carriers in their quest for profit. As was reported in the New York Times and distributed by the Associated Press, the City of Los Angeles is now desirous of closing its airport by reason of the fact that the already financially strapped cities have an added burden of financing the air travel of the rest of the country — let the Federal Government pay for *all* citizens' rights to travel or let the airlines raise ticket prices to pay these damage suits.

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The holding below, if allowed to stand, will in effect reverse *Griggs* and *Causby* and reverse the multitude of Federal and State case law such as:

Boardman v. *United States,* 376 F.2d 895 (Ct. Cl. 1968);

Ferguson v. *City of Keene,* 238 A.2d 1;

United States v. *357.25 Acres of Land,* 55 F. Supp. 361 (wd. La 1944);

Adaman Mutual Water Co. v. *United States,* 186 F. Supp. 658 (Ct. Cl. 1958);

Aaron v. *United States,* 311 F.2d 789 (Ct. Cl. 1963);

Avery v. *United States,* 330 F.2d 640, 643 (Ct. Cl. 1964);

Bacon v. *United States,* 295 F.2d 1936 (1961);

Batten v. *United States,* 292 F.2d 144 (10 Cir. 1961);

Freeman v. *United States,* 167 F. Supp. 541 (wd. Okla. 1958);

Schubert v. *United States,* 246 F. Supp. 1970 (S.D. Tex. 1965).

For these reasons a writ of certiorari should issue to review the judgment of the Second Circuit.

Respectfully submitted,
The Petitioners
By Roger J. Frechette, Esq.
Their Attorney.

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Supreme Court
F I L E
FEB 16
MICHAEL RODAK, J

In the

Supreme Court of the United States

JANUARY TERM, 1973

No. 72-1137

The City Of New Haven,
Petitioners,
v.
The Town Of East Haven, et als.,
Respondents.

APPENDIX TO PETITIONER'S BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Roger J. Frechette, Esq.,
215 Church Street,
New Haven, Conn. 06510
Attorney for Petitioner.

THE MACK CO., NORTH HAVEN, CONN.

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[redacted]

[redacted]

[redacted]

No. 72-1137

Nov. 22, 1972

THE CITY OF NEW HAVEN,

[redacted] appellant-Defendant

v.

THE TOWN OF EAST HAVEN, ET ALS.,

[redacted] appellee-Plaintiff

APPENDIX TO PETITIONER'S BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION OF THE UNITED STATES COURT OF APPEALS

Appeal from an award of damages for "inverse condemnation" made by the United States District Court for the District of Connecticut, the late Edward C. McLean, *Judge*, to individual residents in whose properties appellant acquired easements as a result of turbo-prop and jet aircraft service at its Tweed-New Haven Airport.

Affirmed.

Roger J. Frechette, Assistant Corporation Counsel, New Haven, Conn., *for Appellant-Defendant.*

Anthony V. DeMayo, New Haven, Conn. (Cohen and DeMayo, New Haven, Conn., of counsel), *for Plaintiffs-Appellees.*

Moore, *Circuit Judge:*

The plaintiffs are the Town of East Haven and property owners whose properties are in the vicinity of the Tweed-New Haven Airport, an airport owned and operated by the City of New Haven (the City). The defendants are the City of New Haven, Eastern Airlines and Allegheny Airlines, Inc.[1] After a non-jury trial, the District Court dismissed the action against the Airlines and dismissed all claims against the City except claims for compensation for easements taken by the City in seven specific properties of seven plaintiffs. After a

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[1] Originally the Administrator of the Federal Aviation Agency was a party defendant. On motion the action against him was dismissed. The City was added as a defendant in an amended complaint.

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supplemental hearing as to damages, the District Court awarded various amounts ranging from $2,100 to $3,300 for a total of $18,400.[2] "Upon payment of the judgments, defendant City of New Haven will acquire a permanent easement in the properties of these plaintiffs for the operation of a similar number of turbo prop planes and jet planes of the size in use at the time of the trial [October 14-27, 1970]." 333 F. Supp. 338, 341 (S.D.N.Y. 1971). The City appealed from the award of damages to those property owners.

The history of the development of the airport and its commercial use by Eastern and Allegheny Airlines as well as by private planes has been graphically and thoroughly set forth in the late Judge McLean's opinion, 331 F. Supp. 16 (1971). The location of the properties owned by the individual plaintiffs (the recipients of the damage awards) in relation to the airport and its runways has been described in his original and supplemental opinions, 331 F. Supp. at 21-26 and 333 F. Supp. 338 (1971).

The airport serves the City of New Haven and accessible cities and towns. It has been developed by the City aided by federal funds, pursuant to the National Airport Plan authorized by the Federal Airport Act, 49 U.S.C. § 1101 *et seq.*

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[2]

Michael Fusco	$2,500
Leslie Munro	$2,850
Leslie Munro	$2,100
Michael Criscuolo	$3,200
Alphonse Guidone, Jr.	$2,250
Louis Audette	$2,200
Leon Amendola	$3,300

The appellate issues before us are exceedingly limited. In fact the City concedes as much, saying (Brief, p. 11): "The question is whether plaintiffs have succeeded in proving the amount of that damage with reasonable certainty." The City claims that plaintiffs have proven no damage. No issue of injunctive relief is raised. The District Court denied any such relief, stating: "The right of the public to travel by air by means of modern airplanes far outweighs the disadvantage to the relatively few persons, such as these plaintiffs, who are adversely affected to some extent." 331 F. Supp. at 30. Moreover, "Trespass, Annoyance and 'Emotional Damage'," as well as nuisance were rejected as items of damage by the Court. In short, the City questions only the award of damages for the easements taken in these specific six properties.

The City's arguments assert many grounds. First, the City attacks the quality of, and the method used by, the plaintiffs' damage appraiser and extols the opinion of its own. Differences in opinions of appraisers in real estate valuation cases are not altogether surprising. The Trial Court had to, and did, weigh the testimony presented by all the parties and arrive at his own conclusions. Second, the City points to the fact that the plaintiffs acquired their properties subsequent to the creation of the airport. This fact alone is not determinative because, as the Trial Court found, plaintiffs' "grievances are based on later operations of turbo-prop and jet aircraft, particularly the jets." 331 F. Supp. at 20. Although the City takes issue with this conclusion, there can be no doubt that the advent of the jets aggravated the situation. As to the City's third claim, that the Court found it guilty of trespass, the Court held that "there should be no separate recovery by

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any plaintiff of damages for trespass, either against the City or against the airlines. * * * Where there has been no taking because there has been no significant invasion of plaintiffs' property, it would seem to follow, at least as far as the City is concerned, that there has been no trespass on that property." (*Id.* p. 35). Fourth, the City asks, "Can you have a taking when the value of the property has appreciated?" (Brief, p. 31). The answer is clearly "yes". The Court, after weighing all the testimony, quite properly found that the fair market value of certain of the plaintiffs' properties had been reduced, even though this value exceeded the original acquisition cost. 333 F. Supp. at 340. His discriminating approach is evidenced by the denial of damages to five other party plaintiffs. Fifth, the attack upon jurisdiction and the claim of *res judicata* made by the City are rejected. Lastly, the City urges that there is "UNCERTAINTY OF JUDGMENT" in that the judgment does not "indicate with reasonable clearness the decision which the Court has rendered * * *." The City asks (Brief, p. 61) what kind of "an easement which is not defined as to length, width, height, or actual use, * * *" will it receive upon payment of the judgment awards, and in what form will such an easement be drafted in order to be recorded in the Land Records office.

To a certain extent the last point is well taken but it does not render the judgment void for uncertainty, as the City argues. At the time of trial, the Court had before it the specific flight schedules of Allegheny and Eastern. Allegheny operated five flights per day with Convair 580s (turbo-props) which necessitated five landings and five departures. Eastern operated two jet flights, with two arrivals and two departures. In addition, numerous private and corporation-owned planes (some jets) used the airport. The airport is operated by employees of the Federal Aviation Agency who control all traffic in and out of the airport. Directions for landing and take-off are given from a control tower and the runways to be used, of necessity, must be determined by wind, weather and other conditions.

Control of air navigation must be in the hands of the Agency. Certain it is that the courts should give no direction or even suggestion as to its operation. Even more so should the courts make no brash predictions as to the future of air transportation. The history of the development of the passenger plane alone should be a deterrent to prophesy. Forty years ago planes carrying a few passengers could land and take off on short runways — virtually cow pastures. Soon came a series of planes capable of carrying many passengers, landing and taking off at high speeds and requiring ever lengthening runways. Witness the DC series of 3s, 4s, 6s, 8s, 9s and 10s, and the 707s, 727s and now the giant 747.

The planes are available. Whether the City of New Haven will wish to have them is, or should be, entirely a legislative decision. Already the populace has apparently aligned itself into two factions — those who wish to preserve the comparative peace and quiet of their residential communities and ban further expansion of the airport so as to prevent invasion by even noisier planes, and those who would measure "progress" by their ability to go from New Haven to some other city in minutes or a few hours.[3] And in the background is always the specter of the supersonic plane.

What the future will hold is not for present Court conjecture. Were we to heed the wisdom of an earlier era, we would know that "The Moving Finger writes; and, having writ, Moves on; * * *."[4] Aviation has indeed moved on. Thus the past decision that have been "writ" dealing with invasions of property rights are useful only for their attempted creation of general principles. Obviously, a rule of reason approach must be followed in the resolution of future problems.

The judgment of the court below does not require that the City receive a formal easement from each plaintiff to whom damages have been awarded. Nor do we. The opinion states, as definitely as the situation permits, the basis for the taking that occurred. For this the court has awarded damages, presently payable for the present invasion.

Neither the opinion below nor this opinion is to be construed as a template for the future. Whether the Tweed-New Haven Airport will be expanded to permit larger aircraft to land and take off; whether the required glide paths of such planes will affect other residents in a manner similar to that affecting the six plaintiffs in this case; whether a *substantial* variation from the type of air service in effect at the time of the District Court trial will cause further harm to the present plaintiffs; whether some agency of government will issue a decree which will affect property rights — these conjectures are not within the purview of this decision and no opinion is expressed thereon. The judgment appealed from merely requires the City to pay for that which it has already taken. We have considered all of the City's other contentions; none of them has merit.[5]

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[3] The planning consultant of East Haven expressed the opinion that the noise and pollution caused by the jets would adversely affect the stability of the area; the chairman of the Industrial Development Committee of the Greater New Haven Chamber of Commerce spoke in glowing term of the advantages of fast transportation as a stimulant to industrial development. 331 F.2d at 27.

[4] Rubaiyat of Omar Khayyam.

We affirm.

VOLUME 4 — DEFENDANT'S APPENDIX

(317a)

EDWARD F. HEBERGER, called as a witness by the Plaintiffs, being first duly cautioned and sworn by Margherita Cunningham, a Notary Public within and for the State of Connecticut, was examined, and testified on his oath as follows:

By the Notary Public:

Q. Would you please state your full name and address? A. Mr. Name is Edward F. Heberger. I live 1215 Long Hill Road, Guilford, Connecticut.

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[5] The City has moved to file a supplemental brief. The motion is denied.

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Direct examination by Mr. DeMayo:

Q. Mr. Heberger, what is your present occupation? A. I am a real estate appraiser.

Q. Would you advise the Court of your qualifications in this field? A. I am a graduate of the University of Connecticut. I am an M.I.A. member of the American Institute of Real Estate Appraisers. I am a senior realty appraiser member of the Society of Real Estate Appraisers. I am a senior member of the American Society of Appraisers. I have been (318a) appraising property full time since 1958. I teach courses in appraising for the University of Connecticut Extension School.

Q. Have you qualified as an expert witness in states other than Connecticut? A. Yes, I have.

Q. What states? A. Maine, Vermont and New York.

Q. Have you completed any advanced courses in real estate appraising? A. Yes. I have successfully completed four courses sponsored by the American Institute of Real Estate Appraisers, and I completed a course at the School of Acquisition of Real Estate in New York State.

Q. Have you frequently lectured to seminars and courses on the subject? A. I would say occasionally.

Q. As a matter of fact, were you scheduled to lecture today until this case was scheduled? A. I was scheduled to conduct, not lecture, just run a seminar which was a joint meeting between the Connecticut Chapter of the S.R.E.A. and A.I.R.E.A.

Q. Your qualifications are set forth in each of the appraisal reports that you have prepared for this matter, are they not? (319a) A Yes, they are.

Q. Now, with respect to the present litigation, prior to embarking upon any of your work, did you read the judgment of this Court in this case? A. Yes.

Q. That is Judge McLean's judgment, a copy of which I showed you? A. Yes.

Q. After reading the judgment and a conference with me, what did you undertake to do? A. I undertook to prepare a market study, a study of the reactions of the market in the area influenced by the airport.

Q. Did you also examine various appraisal periodicals and journals and theses? A. Yes, I did.

Q. What approaches were considered by you in arriving at in this report? A. Over three recognized approaches were given consideration, the cost approach, the value of the market data approach to value, and the income approach to value.

Q. Did you utilize those approaches in preparing your report? A. I utilized two approaches, the cost approach and the market data approach.

(320a)

Q. As a result of your examination of this particular situation and the data you acquired, what did you decide upon as the method to be employed in evaluating the damages to each one of these property owners? A. Well, with respect to six of the properties, the market data approach was used,

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and with two of the properties the cost approach to value was used.

Q. These were utilized in arriving at what figures? A. The before and after values of the properties being appraised.

Q. Did you also apply to each of these properties an additional method in determining the damages claimed by the property owners? A. Yes. We used what is known as the factor formula for estimating the damages caused by an avigation easement.

Mr. DeMayo. If your Honor please, with your permission, I think I might facilitate things if I gave your Honor and Mr. Frechette Schedule "A" which would list the properties, and you wouldn't have to take extensive notes and figures. May that be marked? Is there any objection to this, Mr. Frechette?

Mr. Frechette. No.

The Court. We will just mark it for this hearing.

(321a)

Clerk Grimes. This will be DeMayo Exhibit 1 of 10/18/71.

(DeMayo Exhibit 1 of 10/18/71: Schedule "A").

By Mr. DeMayo:

Q. Now, do the figures listed on Schedule "A" set forth your appraisal of the value of the property for the taking, after the taking and also the damages which you computed?

A. Yes, they do. May I say at this point that both Donald Nitz and myself worked on these appraisals together.

Q. In other words, he worked with you and combined the data, and this is a joint report? A. Yes, and we both signed the appraisal reports.

Q. This is the case an all properties? A. Yes.

Q. Mr. Nitz is in Court? A. He is.

Q. Starting with the appropriate report for 52 South End Road, property in the name of Mr. Erle Jones, is that the first report on your schedule? A. Yes, it is.

Mr. DeMayo. If your Honor please, to facilitate following this both by you and Mr. Frechette, I have a set of those which I shall show you. I suppose I should probably offer them (322a) one at a time so you can follow with Mr. Heberger, so I will follow that procedure, and you follow it in that fashion.

I would offer, then, the report on 52 South End Road on the property of Mr. Jones.

(DeMayo Exhibit 2 of 10/18/71: Appraisal Report of 52 South End Road, East Haven, Connecticut.)

By Mr. DeMayo:

Q. Mr. Heberger, in connection with your preparation of 52 South End Road, the property of Mr. Jones, would you explain to His Honor what the purpose of your appraisal was and how you arrived at the various values? A. The purpose of preparing the appraisal was to arrive at an estimate of the damage created as a result of the avigation easement over

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the property. In order to do this, we estimated the value of the property before the taking.

In the case of 52 South End Road, we could locate no sales of similar properties, so in this case we used the cost approach to value to estimate the value prior to any taking.

Q. After you arrived at the value of the property as you considered it prior to the taking, did you then address yourself to the question of computing a reduction in value occasioned by the taking? (323a) A. Yes, and we did it based upon a factor formula about which perhaps a little background would be in order.

This factor formula has been utilized a number of times in connection with airport cases, if that is a correct term. It was developed by an M.A.I. appraiser in Macon, Georgia, and a professor at the University of Georgia in 1955 or so, and the formula is based upon analysis or studies of damages at various airports as shown by market analyses, so we applied the formula to the subject property, and we developed damages of $2,300.

Mr. Frechette. I object to that conclusion. I don't think it is time that his conclusion should come in. The specfiic reason is there is no foundation for it at this time.

The Court. I will let him answer. He will develop it, I am sure.

By Mr. DeMayo:

Q. In discussing or explaining the factor formula, is this the material that starts at page thirteen of your appraisal? A. Yes, it is.

Q. Would you explain briefly the factors that go into evolving the formula? A. All right. As set forth at the top of page thirteen, there are three principal factors. The first is the height (324a) from the ground surface. This is the glide angle plane and we used a fifty to one glide angle plane, which is the accepted way of doing this.

Q. Is this also the glide angle plane in use at Tweed-New Haven Airport? A. Yes, it is.

Q. When you say the height from the ground surface or glide angle plane, would you explain exactly what that dimension indicates just for the record? A. We start at the end of the runway for zero, and we take a fifty to one line to a distance of 25,000 feet out from the end of the runway, and based on this line we calculate the height at the bottom of the glide angle plane from ground level to the bottom of the glide angle plane.

Q. Is this shown on the diagram on page 16? A. Yes. This diagram on page 16 is strictly for the example as shown. Each of the appraisal reports has an example of the technique as we used it.

Q. So the actual computation for this particular property would be the diagram that is shown on page 21? A. That is correct.

Q. After computing the height from the ground, I take it you — by the way, when you say the height from the ground, you mean the height over the subject property which a plane passes on approaching at a fifty to one flight angle? (325a) A. That is incorrect.

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Q. Correct me, then. A. This glide angle plane — a plane cannot fly below the glide angle plane. They do fly higher. The glide angle plane is also established so no obstructions are constructed above this height.

Q. How does the height from the surface of the glide angle plane enter into your formula? Would you explain that to His Honor either by use of the diagram or the text? A. On page 15 at the top of the page it says, "Item one," and with respect to the example and not the specific property, we used 3,000 feet, and we used 500 feet for height, and we calculated 51 feet under the glide angle plane to ground level as our third item, so the numbers are a little bit out of sequence, and 500 feet is considered to be the ultimate height. In other words, anything above 500 feet, there is no loss of any type; it is considered to be free air space and no damage would result; so, we computed again on the case of the example, 51 feet, and 51 feet into 500 feet is approximately 10 percent, rounded out to 10 percent, and this is built into a weighted average, and we come up with 90 percent times 50 percent. Fifty percent is a total percentage of 100 percent that is assigned to this category.

Q. In other words, in this formula 50 percent of the loss factor is weighted in terms of the distance over the (326a) property that a plane passes? A. That is correct, so what we are trying to establish is what percentage of that 50 percent —

Q. In your formula, .45 is the factor that is computed to be resulting from the height over the property of the airplane? A. In the case of the example, that is correct.

Q. What are the other two? A. The second is, again, this is item two on page 13, the distance at a right angle from the center line of the runway extended.

Q. Would you explain that? A. It is shown in the illustration on page 16. This would be the 3,000 — it comes out 3,000 feet from the end of the runway, and in the case of the illustration, it is 500 feet distant from the center line of the runway extended at a right angle.

Q. So what you project into the formula with this factor is the lateral distance from the runway to the subject property? A. Yes.

Q. Finally, what is the third element of the formula? A. The third element is the distance from the end of the runway to the property.

Q. As I understand you, then, this formula takes into (327a) account for the subject property the height at which planes pass over the property, the distance of the property from the center line of the runway or extended, if necessary, and finally the distance of the subject property from the end of the runway? A. That is correct, and as pointed out in the analysis, what this does, it sets up a relationship for each property that is affected and falls into these zones, one to the other, and it is based in part upon the value of the property being appraised, and then these three factors are taken into consideration so you can come up with a specific loss, if any, for any property within the approach zones.

Q. As a necessary function, then, of this formula, the proximity to the airport runway and the closer the property is to the runway or to the end of the runway and the lower the plane over the property, the greater would be the weight of these factors, is that correct? A. That is correct, sir.

Q. That would also be affected by the value of the property? A. That is correct.

By The Court:

Q. How do you apply this formula to the value of the property? A. This is shown, your Honor, in the case of the (328a) example on page 15.

By Mr. DeMayo:

Q. May I suggest you follow through with this subject property for His Honor on this? A. All right.

Mr. DeMayo. If your Honor would prefer that, I think it would make it more sensible.

By The Court:

Q. This is a theoretical example? A. That is correct. That was done to show any reader of the report how the formula is used before we applied it to the specific property in question.

Q. I don't care whether you use the theoretical example or the particular property. I was just interested in finding out how you apply this formula. A. All right. Why don't we stay with the example?

By Mr. DeMayo:

Q. All right, go ahead. A. On page 15, your Honor, we set up a weighted average at the top of the page of 85.10. After we have worked out our percentages and computed the distances, we come up with 85.10, which is actually an 8.51 factor.

Q. May I suggest you start at the top of page 15 and explain the 3,000 divided by the 25,000 and the 12 percent so His Honor can see every computation? (329a) A. The 3,000 feet in the case of the example is the distance from the end of the runway. The 25,000 feet is for the purposes of the formula, the ultimate distance. Anything beyond 25,000, certainly there would be no damage in our opinion, so 3,000 divided into 25,000 or vice versa equals 12 percent on this complement, and 12 percent from 100 equals 88 percent, and then 20 percent is that portion of 100 percent which has been assigned for this particular factor. We multiply the 88 percent by the 20 percent. That gives us 17.6.

This formula is something you just don't pick up all at once. It took me a great deal of study and analysis before I could apply it. Perhaps it is difficult to explain, but this is the basis, and I think the rationale is set out in the explanation itself.

Now, we did essentially the same thing for the other two factors. The property being appraised or in the sample is 500 feet from the center line of the runway extended, and according to the formula, anything beyond 2,000 feet, there would be no damage of any kind whatsoever from the center line of the runway extended, so 500 feet is 25 percent of 2,000 feet. Subtracting that from 100 percent, we come up with

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75 percent. We multiply 75 percent by 30 percent, which is, again, that portion of that 100 percent assigned for this factor, giving us 22.5.

For the third item, the bottom of the glide plane is 51 feet above the ground level of the property. The ultimate is considered to be 500 feet. Fifty-one feet is approximately ten percent of 500 feet. We subtract that from 100. It gives us a 90 percent times 50 percent, which is that portion of 100 percent which has been assigned for this factor, which gives us 45.

The total or sum of those three items is 85.1, which is divided by 10, which is a factor that is built into the formula, which gives a final factor of 8.51 in the case of the example, so we take 8½ percent of the value. We just estimated a value of $25,000 in going through the example, so 8½ percent of $25,000 is $2,125 in the case of the example. We subtract that from the $25,000 estimated value before, and it results in a value of $22,875 which is rounded out for practical purposes to $22,900, leaving us a damage of $2,100 in the case of the example. We followed this formula in estimating the value of all the properties.

By the Court:

Q. The formula leads you ultimately to a percentage, as I understand it? A. Yes.

Q. Which in the case of your example is 8.51 percent? A. Yes, your Honor.

(331a)

Q. That percentage of what you think the value was before the flights occurred represents your opinion as to the damage? A. Yes, essentially yes, that is correct, your Honor.

Mr. DeMayo. Before I ask any other questions, does your Honor want any part of the formula gone over or explained further?

The Court. I think it will be clear when I read this. It is reasonably clear now.

By Mr. DeMayo:

Q. If I can just recap the computation, it is as you noted it on lines 1, 2 and 3 above the three figures which are applied to each of those phases, namely, the 25,000 feet, the 2,000 feet and the 500 feet represent the point at which the formula ends and anything beyond that is not considered to be damage-worthy, shall we say? A. That is correct, and this is based on the approach zone itself. It is not something arbitrarily arrived at.

Q. Would you explain why those three measurements are significant? If you want to use the diagram for clarity's sake, you are free to do so. A. All right. This is based upon the typically recognized approach zones for modern runways, and it is also based upon evidence that was introduced at what I understand to be a previous hearing in this matter, and (332a) these are established, I believe, through the F.A.A. with respect to distances, and so on.

Q. All the subject properties you examined would be within the configuration of this schematic approach zone, would they not? A. They would; they are.

Q. As a matter of fact, at least two of the properties are actually within the boundary of the clear zone, are they not? A. Yes. One definitely is.

Q. One and possibly two? A. Yes.

Mr. Frechette. I don't want to object, but clearly this was leading.

The Court. Yes. Don't lead him.

By Mr. DeMayo:

Q. With regard to the subject property, then, Mr. Heberger, you testified you arrived at a value for this property based on the cost reproduction method, is that correct? A. Yes.

Q. Then you applied this formula to that figure? A. I did.

Q. And reduced that figure that you arrived at from the cost approach by that amount? (333a) A. That is correct.

Q. As a result of that, what did you conclude to be the damages suffered by virtue of the taking? A. $2,300. I might say this property itself does fall within the clear zone, and I know in the cases of many or several airports that there aren't supposed to be improved properties in the clear zone.

Q. With respect to that figure of $2,300, based on your own knowledge of real estate and experience in the field, does the figure which you have given us of $2,300 for this subject property, is that figure consistent with your own professional opinion as to the damage suffered by the property?

Mr. FRECHETTE. I object. I feel there is no foundation for any further comments by this witness.

The COURT. I will let him answer.

A. Yes.

By The Court:

Q. Am I correct with respect to this particular property — and we are now talking about 52 South End Road — the factor or percentages is 9.4 whereas in the example it was 8.51? A. Yes, your Honor, you are correct, and the factor will vary from property to property.

(334a)

Q. Depending upon their location? A. Yes, sir.

By Mr. DeMayo:

Q. Mr. Heberger, I wonder if you would clear up one possible point of confusion with regard to page 17 of this report entitled, "Appraisal Example of Factor Formula," and the third sentence on that first paragraph talks about the total width of the runway, 2,000 feet. I believe a word has been omitted from that which we should clarify so His Honor won't be confused when he reads it. A. Yes. It is the approach zone.

Q. It is actually the width for that approach zone, is that correct? A. Yes.

Mr. Frechette. I am sorry. I missed that.

Mr. DeMayo. On page 17, Mr. Frechette, I think this will be clear when you read it the second time.

Mr. Frechette. What paragraph?

Mr. DeMayo. The third sentence of the first paragraph. It says that the total width of the runway is 2,000 feet. The runway is not 2,000 feet wide. It is the total width of the approach zone with the runway extended, in other words. I think a word has been inserted or a parenthesis omitted (335a) there.

If your Honor please, I have not gone into a description of the property since it is in the report, but if you want it on the record, I will have him go through a discussion of what the property consists of, the cost factors, the footage, and so on. Do you think it is necessary?

The Court. I hardly think so. It is all set forth in the report, and Mr. Frechette can cross-examine about that aspect of it if he wants to. We will give him a chance when you are through to read all this before he has to cross-examine about it.

By Mr. DeMayo:

Q. With respect to the next piece of property, 2 Meadow Place owned by Mr. Amendola, is this the appraisal you have prepared for that property? A. Yes.

Mr. DeMayo. I offer that, your Honor.

(DeMayo Exhibit 3 of 10/18/71: Appraisal Report of 2 Meadow Place owned by Leon Amendola.)

By Mr. DeMayo:

Q. With respect to that parcel, did you arrive at a market value figure representing what you felt to be the reasonable market value of that property? (336a) A. Yes, I did.

Mr. DeMayo. Does your Honor want to take time to set that up? You will recall this piece of property is sort of off the beaten path.

The Court. I remember where it was.

Mr. DeMayo. There is a map in the appraisal which might be of assistance to your Honor. It is on the extension of the other runway. Let me see if I can find the map.

The Court. It was Eastern Airlines Exhibit A at the trial, which is the map we all used so much, I think, and it is true that Mr. Amendola wasn't even on the map, but the record shows where he is.

The Witness. May I show your Honor?

The Court. I can see.

The Witness. O.K.

The Court. If we could somehow or other display this where we could all see it, it would be helpful. Have we got a board or anything we could tack this to?

The Clerk. I can get one at recess.

The Court. This shows the runways and zones and all of the things he is talking about.

Mr. DeMayo. Yes.

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(337a)

The Court. Let's get one now.

(Whereupon, a recess was taken at 10:40 o'clock a.m.)

(The Hearing resumed at 10:50 o'clock a.m.)

Mr. DeMayo. Your Honor, I was talking with Mr. Frechette about the question of whether we had to burden your Honor with a recitation eight times. I was going to make this suggestion, that the appraisals are all here, and Mr. Heberger will testify that this formula was applied as he explained to all of the properties. If your Honor thinks there is any merit to it, I would offer all of them with the understanding this was the way it was arrived at. Each appraisal has substantiating data as to how the original figure was obtained, and unless your Honor would like to hear more on any one of them, it would be merely a repetition of what he has said.

Mr. Frechette. I have no objection. I know your Honor would let the reports in anyway, and it would save time.

The Court. Very well. We can mark them all.

By The Court:

Q. Did you apply this formula to each of those properties? (338a) A. Yes.

Q. In the same manner? A. Yes.

Q. The formula varies, I suppose, depending on the location of the property? A. It does.

Q. You didn't always use the cost approach to determine the original value? A. Only in two cases, your Honor.

Q. We have already had one of them which is Jones. Which is the other one? A. The one before you now, 2 Meadow Place, your Honor. This is a unique property as the photograph will show. It is a semi-luxury stone building, dwelling, single-family residence with many rooms, and we could find no comparable data of any kind to guide us in ascertaining the value of the property. Therefore, we did this on the basis of the cost approach.

The Court. I suggest you mark all of the appraisals. He doesn't have to explain the formulas in all of them each time, but you might want to ask him something about how he reached the original value because, apparently, the first two are different than all of the others in that respect.

Mr. DeMayo. Yes, your Honor.

This is the property at 110 Morgan Avenue owned by Leslie Monroe.

(DeMayo Exhibit 4 of 10/18/71: Appraisal Report for 110 Morgan Avenue owned by Leslie Monroe.)

By Mr. DeMayo:

Q. With respect to that property at 110 Morgan Avenue — and your appraisal is now Exhibit 4, Mr. Heberger — how did you arrive at the starting point, the market value figure for this subject property? A. By analyzing what sales were available that we thought would indicate a value for this property because they were similar to it, similar to it with respect to many factors.

Mr. DeMayo. The next property would be 25 Holmes Street, the property of Michael Fusco.

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The COURT. You have another Monroe, don't you?

Mr. DEMAYO. Yes, your Honor.

The COURT. Wouldn't it be a good idea to make that the next one to keep all of the Monroes together?

Mr. DEMAYO. Let's make 114 Morgan Avenue Exhibit 5. That would be the other Monroe property.

The CLERK. What is the first name?

Mr. DEMAYO. It is also Leslie Monroe, the (340a) same person.

(DeMayo Exhibit 5 of 10/18/71: Appraisal Report of 114 Morgan Avenue owned by Leslie Monroe.)

By Mr. DeMayo:

Q. With respect to the Monroe property at 114 Morgan Avenue, what methods were employed to arrive at the market value? A. We used the market data approach. I might say that market data was limited in the area. We did find what we felt to be a sufficient number of sales for the six properties where the market data approach was applied, but the number of sales was limited, and the sales were on somewhat varying types of properties for the most part, especially those situated on the water front, but we have interpreted the data to the best of our ability.

Mr. DEMAYO. We will make 25 Holmes Street, Mr. Fusco, Exhibit 6.

(DeMayo Exhibit 6 of 10/18/71: Appraisal Report of 25 Holmes Street owned by Michael Fusco.)

By Mr. DeMayo.

Q. Is there anything with respect to that property? A. Again, we applied the market data approach to this property. This is more, I suppose we could use the term, a standard type of property. There was more market data available for this property.

(341a)

Q. Holmes Street is at the opposite end of the north-south runway, is it not? A. Yes, it is. I might say this property is partly in New Haven and partly in East Haven.

Mr. DeMayo. Mr. Audette's property on Silver Sands Road would be Exhibit 7.

(DeMayo Exhibit 7 of 10/18/71: Appraisal Report of 735 Silver Sands Road owned by Louis Audette.)

By Mr. DeMayo:

Q. With respect to Mr. Audette's property, what method did you employ there? A. We employed the market data approach. We had to go a little bit outside of the area to get our market data because this property was rather unique for the area. It is sort of an old farmhouse-type dwelling on the property, and we had to go to Thompson Street to get our comparison information.

Mr. DeMayo. The next parcel would be 72 Morgan Avenue, the property of Michael Criscuolo. That would be Exhibit 8.

DeMayo Exhibit 8 of 10/18/71: Appraisal Report of 72 Morgan Avenue owned by Michael Criscuolo.

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By Mr. DeMayo:

Q. How is your valuation determined there? (342a) A. By the use of the market data approach. This property was somewhat unique. It is split-level, single-family residence on the shore, but we found what we believed sufficient sales to estimate the market value through the use of this approach, and in the analysis the pluses and minuses were the differences likely between the property being appraised and the comparision properties and how we analyzed the properties.

Mr. DeMayo. Finally, this is Exhibit 9, 6 Canna Drive, the property of Mr. Alphonse Guidone.

(DeMayo Exhibit 9 of 10/18/71: Appraisal Report on 6 Canna Drive owned by Alphonse Guidone.)

By Mr. DeMayo:

Q. Was this also arrived at by the market data approach? A. It was. There were quite a number of sales available for comparison to his property. It is part of a residential subdivision.

Q. With respect to all of these properties, you testified you applied the factor formula to each of these so all of the same three elements were involvd, is that correct? A. That is correct.

Q. With respect to the area in general, the Morgan Point area in particular, would you describe this as a (343a) neighborhood or an area which has been fully developed or completely developed, I should say? A. No, it has not been completely developed if by developed you mean with respect to improvements upon the land.

Q. Yes, that is what I mean. Are there open stretches of undeveloped land? A. Yes, there are.

Q. To what do you attribute this lack of development, shall we say?

Mr. Frechette. I would object. I don't think there is any foundation.

The Court. Sustained without a further foundation.

By Mr. DeMayo:

Q. In the course of determining the data and evaluating these properties and preparing these appraisal reports, did you visit the Morgan Point, southend area of East Haven? A. Yes, I did.

Q. Did you spend time yourself physically present in the neighborhood and on these properties and on these streets? A. Yes, I did.

Q. Had you had some previous knowledge of this (344a) neighborhood? A. Yes, I had.

Q. How was that knowledge obtained previous to this? A. I have been observing the neighborhood for a number of years. As a matter of fact, during the Depression, my grandparents lived down at the southend. Since I have been married and had children, I take my children to watch the planes fly. I have been there more or less continually for a number of years.

Q. In the course of your acting as an appraiser in the New Haven area for some time, is it part of your continuing interest and pursuit of the real estate market to keep an eye on areas such as this? A. Yes.

Q. As a result of all that background and your actual physical presence, are you aware of what the area is actually like? In effect, could you describe it to us? A. Yes, I could.

Q. For Mr. Frechette's benefit, would you do that, please? A. The area is heterogenous in character. Primarily, improvements are single-family residential-type properties. These properties vary considerably with respect to character. Along the waterfront, there are some of the finer properties. There are a few properties that are not so fine. In much of (345a) the area, many of the homes, the single-family residential properties are, I would say, at the bottom of the real estate market from a price standpoint. I think for the most part we are dealing with properties that have a value of approximately $25,000 or so. I am speaking mostly now of the southerly approach zone. This is where most of the subject properties are located.

There are expanses of unimproved land. This is due to several reasons. A lot of it is low land, sort of swampy, has a tendency to be wet. I believe there is a tendency of some people there to try and control their land.

Mr. Frechette. Your Honor, I would ask that be stricken. There is really no basis for that comment.

The Court. I will let him answer it. You can cross-examine him.

By The Court:

Q. The land is swampy? Some of this is vacant land? A. Yes, it is. It is covered with marsh grass.

By Mr. DeMayo:

Q. In your opinion, what other factors mitigate against full utilization of all the availability realty?

Mr. **Frechette.** I am going to object, your Honor.

The **Court.** Overruled.

(346a)

A. The airport is undoubtedly a factor, the fact that people don't want to be located in an approach zone to an airport, generally speaking.

Mr. **DeMayo.** I have nothing further, Mr. Heberger, at this time.

The **Court.** All right. We will take a recess to give Mr. Frechette a chance to read some of these reports.

Mr. **Frechette.** Thank you, your Honor.

(Whereupon, a recess was taken at 11:10 o'clock a.m.)

(The Hearing resumed at 11:30 o'clock a.m.)

Mr. **Frechette.** Your Honor, may I state this: I think it will save your Honor some time: I am not seriously contesting any of the market values this witness has given. I don't want your Honor to think my appraisals are on the nose with them, but they are close enough as far as I am concerned, and I state for the record I am in agreement with what he said with one exception, which is 110 Morgan Avenue in East Haven.

The Court. When you say that you are not contesting market values, do you mean the ultimate or original market value?

Mr. Frechette. The original market value.

The Court. What are you contesting is the ultimate market values?

Mr. Frechette. Yes, that is true.

The Court. Derived by applying his formula?

Mr. Frechette Yes, that is true, with the exception of 110 Morgan Avenue, on which I might ask him a couple of questions.

The Court. All right.

Cross-examination by Mr. Frechette:

Q. I notice, Mr. Witness, you use as sale number two 70 Seaview Avenue in Branford. That house, did it not, belonged to Charles Ely? A. Yes, it did.

Q. Have you been in that house? A. No.

Q. Seaview Avenue is in Hotchkiss Grove which is in Branford? A. Yes.

Q. Hotchkiss Grove itself is a rather lovely summer area of Branford, is it not? A. I would say parts of it are.

Q. You don't think the whole of Hotchkiss Grove is? A. As an entirety, not necessarily.

(348a)

Q. Would you mind telling me, Mr. Witness, what part of it you think is not? A. As I recall Hotchkiss Grove, there are some parts out near the highway, 146, that are less desirable than other parts.

Q. By less desirable, what do you mean? A. Less expensive, lesser value than the average.

Q. Is there anything in the entire Hotchkiss Grove that is under $30,000? A. No, not to my knowledge.

Q. The Ely house has wall-to-wall carpeting throughout, does it not?

Mr. DeMayo. I object. He has testified he was not inside the house.

The Court. He may answer that he doesn't know if he doesn't.

A. I do not know.

By Mr. Frechette:

Q. Ely's house, quite frankly, is a picture? It is lovely from the outside?

Mr. DeMayo. I will object because Mr. Frechette through this kind of questioning is testifying. I don't think he should be permitted to deliver this lecture.

The Court. I will allow it. It is cross (349a) examination.

A. It is a nice home.

Q. There is nothing out of place as you look at it at all, is there? A. I don't know.

Q. Doesn't it have a stone wall in the front of Stony Creek granite? A. I don't know. I don't recall.

Q. What color is it? A. I don't recall that. I do not recall that.

Q. Can you tell us anything about the lawn and upkeep of the property? A. Nothing. I viewed it briefly with Mr. Nitz, and I cannot testify to that.

Q. Do you know how long it was on the market? A. No, I don't.

Q. Referring to the sale number one which is on page 11 of this report, the property that Dave Berdon purchased at 98 Morgan Avenue, comparing 98 Morgan Avenue with the subject property of 110 Morgan, is it a fair statement that 98 was considerably better kept? A. Possibly, yes.

Q. Isn't it so that Dave Berdon also bought the furniture that went with the house when he purchased it at the price of 41-5? (350a) A. I am not aware that 41-5 included the furniture.

Q. If it did, in fact, include the furniture, is it a fair statement that would be anywhere from $3,000 to $5,000 on the price?

Mr. DeMayo. I would object again unless Mr. Frechette is prepared to state he is going to introduce this into evidence.

Mr. **Frechette.** As a matter of fact, I am, but I think it is a legitimate question in any event.

The **Court.** Overruled.

A. I would say probably $2,000 to $3,000, Mr. Frechette.

Q. Let me ask you this: Would you seriously object to a value of 37-5 for the property at 110 Morgan Avenue without the personalty thrown in? A. Yes.

Q. You would? You would object to it? A. I would object. It is my opinion that the property is worth more than that exclusive of the personalty.

Q. If we get to the 41-5, how much do you take off for the personalty? A. I would say two to three?

Q. That would bring it down to either 39-5 or 38-5, isn't that so? A. It would bring it down to 39 and 40.

(351a)

Q. Isn't it 41-5? A. 110 Morgan is at $42,000.

Q. That's right. You do tell me that 98 Morgan is at least in better condiiton than 110 Morgan as far as you can see? A. Yes. With regard to condition, they are fairly similar, I would say.

Q. Which one is older, do you know that? A. I am not certain at this time, no.

Q. Let me ask you, if I might, in this summary you are using, you are testifying about a dimension of 25,000 feet from the end of the runway which would be affected by this formula about which you spoke? A. That is correct. That is considered to be the approach zone.

Q. It is considered to be the approach zone by whom? A. Well, this is based upon factors that have been evolved through the studies of other airports. It was built into the formula as I described before by the two individuals that developed it, and I believe this comes from F.A.A. criteria.

Q. What do you mean, the formula comes from the F.A.A. criteria? A. No, the approach zone.

Q. Your answer to that is no, the 25,000 foot figure (352a) is nothing that comes from the F.A.A. as far as this formula goes, it is not an F.A.A. formula? A. No.

Mr. DeMayo. We don't make that claim, your Honor.

Q. Is it your statement that two people have come up with this formula, one of the factors of which is 25,000 feet from the end of the runway? A. Yes.

Q. What are their names? A. Thomas Hall and Professor Beaton.

Q. Were you ever employed by them? A. No, I was not.

Q. Where did you get this information? A. From two sources. I spoke to Mr. Hall on the telephone at length, and he has written two articles, one in conjunction with Mr. Beaton, that were in the *Appraisal Journal*. One was January of 1965. That is essentially where the information came from.

Q. So to recap, this is the theory of two fellows, and you read it in a real estate appraisal journal? A. *Appraisal Journal.*

Q. And you talked to them on the telephone? A. Yes.

Q. How long did you talk to them on the 'phone? (353a) A. Twenty minutes, half-an-hour perhaps.

Q. When was that? A. About three weeks ago, four weeks ago.

Q. How long is that article that is in the *Journal?* A. Oh, I would say about sixteen pages.

Q. Sixteen pages? A. Yes.

Q. What edition of the *Journal* is it? A. January of 1965.

Q. Let me ask you this, if I might: What airports formed the basis for this formula? A. Well, the initial study was based upon a military airfield somewhere in Georgia. I forget the name of the field, but in my telephone discussion —

Q. Let me stop you there if I may. Are you telling us, then, as far as the article written in the *Journal,* that is based only on a study at a military airfield? A. That is correct.

Q. Would you finish up what you were saying? A. Mr. Hall told me in a telephone conversation —

Q. He told you this? A. Yes.

Mr. DeMayo. I object, your Honor. I would ask your Honor not to permit him to testify.

The Court. I will allow it. You wanted to (354a) know where he got it, and I will let him answer it.

Mr. DeMayo. I hate to press this, but I think he has answered the where. What I would object to is his how.

The Court. I will let him answer.

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A. (Continuing) He said that this has been reinforced through other work he has done. He had another article, I believe, in the April, 1971, issue of the *Appraisal Journal* where he also went into this a little bit but not to as great an extent as he had done in his 1965 article, but he came up with essentially the same conclusions.

By Mr. Frechette:

Q. What airport did that cover? A. This was based upon his experience since the initial study.

Q. I understand that. In what airport does he have the experience? A. I cannot tell you any specific airports.

Q. In the 1965 article, that was at a field in Georgia? A. I believe it was, yes.

Q. In that article that was published in 1965, I take it it takes into consideration facts that pre-existed 1965? Wouldn't that be so? A. Yes.

Q. Over what period of time at the military base did (355a) these facts exist? I am not certain, but they covered the transition from propeller driven to jet aircraft.

Q. You don't know what year? A. I believe the initial study took place about two years prior to the article, 1963 or '64, in that area.

Q. So it would be a 1963 or 1964 study of one airport; is that right? A. I cannot say if the whole study is based upon one airport. This article was written in conjunction with that one airport, but according to my conversation with him, he has been doing this type of study for a number of years and may have done others prior to that.

Q. But as far as you are concerned, the 1965 article covers one airport, is that so? A. Yes.

Q. Let me ask you this: What type of planes were flying into that one airport, do you know that? A. The article stated, I believe, it was varying types of aircraft, probably jet bombers and fighter aircraft, and so on.

Q. Do you know that? A. I do not know that to be a fact.

Q. Can you tell Judge McLean what kind of aircraft were, in fact, involved in the study that was written in 1965? (356a) A. Not for sure. I believe he stated it in the article.

Q. Can you tell us for a fact, not what you believe? A.No.

Q. Can you tell us how many flights per minute were involved in the 1965 study? A. No, I cannot.

Q. Have you testified in any other courts besides this one in Connecticut? A. Yes.

Q. Where? A. I testified in the Court of Common Pleas.

Q. What County, at New Haven? A. New Haven and Hartford both.

Q. How often? A. I have been in Court in Connecticut probably twenty, twenty-five times.

Q. Over what period of time? A. Three years.

Q. Let me ask you this: As an expert in real estate appraising — and I am going to have to go a little bit afield, but not too far — in Bethany, for example, there is a substantial tract of property, probably forty acres, about one-half of which has been developed for housing, and the other half of this tract which is zoned commercial has (357a) not been developed for housing and, in fact, is going to be used for commercial, as an expert in the real estate appraisal business, if you were to appraise the houses that are in this tract, you would have to discount the fact of the zoning of the entire tract, wouldn't you? A. Not necessarily.

Q. Let me ask you another question: Wouldn't you as a real estate expert be interested in the zone in which the properties are located? A. Yes.

Q. The reason for that would be if a house was in an area which had commercial zoning, it could have next to it, for example, a shopping center with the lights, noise, and exhaust pollution, couldn't it? A. It could.

Q. Of course, that would decrease the value of the house, would it not? A. Not necessarily.

Q. You don't think so? A. I do not.

Q. But you think airplanes do? A. Perhaps —

Q. Just answer that yes or no. But you think airplanes do? A. Yes.

(358a)

Q. Is it your testimony that what something is zoned for has no bearing at all on the market value of the house in that zone? A. That is not my testimony.

Q. It would be important to you to know what the zoning was, wouldn't it? A. Absolutely.

Q. And the reason is that something next to it that is not desirable might depreciate it, mightn't it? A. It might.

Q. Being a real estate expert, you would know that before the first house was built, wouldn't you? A. Possibly.

Q. When you say, "Possibly," don't you mean, "Certainly"? A. I mean I take every factor into consideration.

Q. That is a factor you take into consideration? A. Definitely.

Q. So your answer would be yes, wouldn't it? A. Would you restate the question?

Q. What I am asking is simply this: If a house is in a commercial area, even before it is built, you know it is going to be worth less just because of its location, don't you? A. No.

(359a)

Q. You don't? Therefore, it would appear to you that the zoning would have no effect on it? A. No.

Q. That is not so? A. May I explain?

Q. No. Let me ask you this: Is it your testimony that this formula that you are using applied only to jet airplanes? A. No.

Q. The values you gave Judge McLean are based on September 15 of 1971, is that right? A. That's correct.

Q. They have nothing to do with the commencement of jet operations at this airport, do they? You didn't make their appraisal then, did you? A. The appraisal date — as of the appraisal date, there were no jet aircraft flying, except for one appraisal. The appraisal of 52 South End Road was dated — I forget the exact date, but it was a 1969 date.

Q. Maybe I am misunderstanding. Doesn't your appraisal report speak as of September 15, 1971? A. Not in the case of 52 South End Road.

Q. What dates does your appraisal report speak of? A. With respect to 52 South End Road, we dated the appraisal report January 1 of 1965. All of the other (360a) appraisal reports are dated September 15 of 1971.

Q. They speak as of that date? A. With respect to the market value, yes, sir.

Q. And with respect, I take it, to the diminution of value? A. Yes.

Q. Is there any question about that? A. No.

Q. What you are telling us is that your market value and your diminution of value both speak as of September 15 of 1971, is that right? A. That is correct.

Q. That is despite the fact no jets are flying? A. That is correct.

Q. In your judgment, if a house was worth "X" in 1915 before an airport was there, would there be a minus factor for that house's value in 1931, for example, when the airport was there? A. That is a variable factor. It depends upon —

Q. I tried to phrase it so you could answer it yes or no. It is, I think, a simple question.

Mr. DeMayo. If your Honor, please, I will object. It is impossible for anyone to give an answer to that. He doesn't know the distance from the airport.

The Court. Please read the question.

(Whereupon, the question referred to was read by the Court Reporter.)

Mr. DeMayo. You see my objection, your Honor. In 1915, you could have Mr. Audette's house, and he wouldn't be aware of the fact there was an airport at the other end of the runway.

The Court. I think the question would have to be related to the facts found way back in ancient history.

By The Court:

Q. Before you go any further, where in your reports does it say your appraisal is as of September 15, 1971? A. I believe it is on the final page (looking through documents).

The Court. I see.

Mr. DeMayo. On the signature page, your Honor.

By The Court:

Q. I am looking at Exhibit 4, and it appears on page twenty-four of that one? A. That's right.

Q. That is true of all of them except Exhibit 2, 52 South End Road, where you say you are appraising it as of January 1, 1969, is that right? A. That is right, your Honor.

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Q. You used the same formula in each one of these? A. That is correct.

Q. What puzzles me is did you use this formula without regard to what type of airplane was flying on these dates? A. No, your Honor.

Q. Can you explain what you did with it? A. Yes. The formula can be modified according to the circumstances as they exist. At the time we inspected the properties, there was just these prop jets that were flying. The jet —

Q. You are speaking now of September or October, 1971? A. Yes, your Honor, and pure jet aircraft were not flying from the airport at that time. We modified the formula as set forth in the original article according to several things: Number one, my conversation with Mr. Hall on the telephone, and we analyzed all of the sales in the area that had occurred in the las three or four years. We saw by the analysis of these sales that the formula as set forth in the article would not work because the damages would have been substantially greater that we had estimated them to be. We modified the factors based in part upon what our market study showed. Essentially, our market study — I probably shouldn't say, "Showed." It was inconclusive. There were an insufficient number of sales to really come up with a definitive study, and sales and resales (363a) varied with respect to the average annual increment in value.

In one case, I can't remember the specific property right now, but there had been little or no increment in value over a five-year period. In another case, there was a $500 increase over a three-year period. We found ten or twelve sales and resales in recent times. In some cases, there was a normal increment in value, approximately five to seven percent per year, in some cases three percent per year. The sales were of varying types of properties, so it was difficult to relate one to the other.

We had the waterfront properties that had substantial value. There were properties that were worth $20,000 to $25,000, five-room ranch type structures, inexpensive, relatively inexpensive type homes. We investigated everything that we could, and we made an attempt to key the formula to the market as it existed in the sections of East Haven that are affected by the approach zones to the runways, and this we have done based in part upon judgment and in part upon what some of the market sample told us. The formula we have tried — again, to use the term — to modify to reflect the circumstances as they existed with respect to these properties on the approach zones of the New Haven airport. Again, if we had not modified that formula, the damage estimate would have been substantially greater.

The Court. Forgive me if I pursue this for (364a) a minute, Mr. Frechette.

Mr. Frechette. Yes, your Honor.

The Court. I am just trying to understand it.

By The Court:

You read about a formula by a man named Hall who wrote an article about 1965? A. It was one of a number of articles.

Q. You recently called up Mr. Hall and asked him about it? A. I did.

Q. Do I understand the formula expounded in his article differs from the one you testified to? A. No. The formula is the same. The weight of the factors varied.

Q. How have you varied Mr. Hall's formula? A. Mr. Hall, if I can refer your Honor again to, I believe, it was page 15 of the 110 Morgan Avenue, that will show the same — page 17, your Honor, I am sorry. It is on item three of the three items at the top of the page, that fifty percent factor there is the same. For item two —

Q. I will have to get the same exhibit. A. I have 110 Morgan Avenue.

Mr. DeMayo. Exhibit 4, your Honor.

Q. Page 17? A. Page 17.

(365a)

Q. All right. A. At the top of the page under the first factor that we considered, we have used a 20 percent weight. The initial article called for a 5 percent weight for that factor. Under the second item, we have used a 30 percent weight factor. The Hall-Beaton article called for a 45 percent factor, and the third item, the 50 percent factor, is the same.

Q. The distances Mr. Frechette asked you with respect to the first item, where did you get the 25,000 feet, and you said you got that from Mr. Hall? A. That is correct.

Q. I will ask you where did you get the 2,000 in the second factor? A. That was also derived from the article.

Q. All right. Where did you get the figures in the third factor? A. The 500 feet in the third factor was also derived from the article as well as other readings.

Q. So what you varied from the Hall formula was the weight to be attributed to each factor? A. Yes, your Honor, and there was one other change. The divisor was three rather than ten. We have used a final divisor of ten rather than three. As you can see, were a three to be used, the damage also would have been greater. (366a) Those are the only variations.

Q. You don't know exactly what kind of airplanes were flying at the fields Hall was considering when you developed this formula? A. There was a reference in the article he did mention jet aircraft, your Honor.

Q. What we are trying to do here is ascertain the damage which these various parcels have sustained through the operation of jet aircraft and turbo-jet aircraft. Do you understand that? A. Yes.

Q. This case was tried in October, 1970, just about a year ago, and my opinion citing the merits of that case is based on fact which had occurred up to the time of the trial as it so stands. Do you understand that? A. I do, your Honor.

Q. Apparently, since the trial, for reasons with which I have no concern, the jets have stopped flying, but that doesn't affect, as I see it, the damages that I am trying to ascertain. I want to know the situation as it existed at the time of the trial just as though you had testified at the trial in October, 1970.

Now, you confuse me when you say your figures are all as of September, 1971, when there are no longer any jets. Can you explain that? (367a) A. Yes, I can, your Honor. As stated previously, we had read and, hopefully, digested your decision, and these appraisal reports are tailored to those factors. The date in the certificate does not state in most cases September 15, 1971. However, the factors are reflective of the jets, and this was part of the reason why we did a three or four-year study of sales. We interviewed a number of people, and it is my opinion that this estimate of damage is effective as of October of 1970, despite the date of September 15, 1971. We have attempted to take the jet aircraft into consideration in our appraisal report.

Q. Of course, if you were really doing it as of September, 1971, as your report states, and if it is true, as I assume it is, that there are no jet flying now and were not in September, 1971, then your figures it seems to me would inevitably be much lower than the figures I am talking about because I was concerned in this trial with a situation where the properties were damaged by the use of jets. Do you understand that? A. Yes. A number of people pointed out the damage to us, your Honor.

Q. You are telling me now you are reflecting the jet operation in your figures, despite the date on your reports, is that right? A. Yes. There was a problem, if I may explain, (368a) because of the length of time the jets flew and the lack of the number of sales during that time period. These damage figures could be substantially greater if jet service is reinstated, and depending upon the frequency of flights, and so on. As near as we can compute from the market evidence we did have plus our judgment, these figures are reflective of the circumstances at that time.

Q. Let me just press this once again because I want to get this clear. You said these figures could be different if jet service was reinstated. I can't accept that. I am talking about the time when jet service was in operation. Do you understand that? A. I do, your Honor.

Q. So there wasn't any question of reinstating it, was there? A. That is correct.

Q. And your figures you tell me are as of that time, namely, October, 1970? A. Right. Again, we read your Honor's decision, and that was the basis. We built upon the decision to the best of our ability.

Q. Is this the first time you have testified as to this formula? A. Yes, it is, your Honor.

Q. This is your first testimony in an airport case? (369a) A. Yes, it is.

Q. One more thing and then I will keep quiet. The factor to which you attribute the greatest weight is the height of the planes? A. That is correct.

Q. And your formula assumes a glide angle of two to one, doesn't it? A. Yes.

Q. Two percent? A. Two percent. A fifty to one glide angle is two percent.

Q. A two percent glide angle? A. That is correct.

Q. The testimony in the case was uncontroverted and I also found that, in fact, the glide angle was three percent. Are you aware of that? A. Yes, I recall a three percent.

Q. If it is three percent, the planes would be higher when they pass over the houses than they would be if it is two percent, would they not? A. They would.

Q. Don't you think you ought to modify your formula a little bit to take into account the actual facts? A. All right. Everything that we read, your Honor, indicated that the fifty to one glide angle was the accepted (370a) glide angle. The three percent — I forget just how that was phrased, but we did use the two percent, your Honor.

Q. Under the figures that you used, you assumed planes passing over the properties at a lower point than they actually do, isn't that so? A. No, your Honor. It is the glide angle path, as I understand it, which is the path below which no plane can fly. Usually, they are higher. Usually, they are higher. They are above the glide angle plane. This the path below which no plane can fly nor can any obstructions be constructed.

The Court. I was given the benefit of exhaustive testimony on this subject by people who know all about this, and they certainly made clear to me that the angle which the planes actually follow is three percent above the horizontal. There isn't any doubt about that, is there, Mr. DeMayo?

Mr. DeMayo. That was all the testimony about the VASI system, your Honor, and every plane doesn't come in on the VASI.

Mr. Frechette. As I recall it, your Honor, we had this red, white and pink thing so much before us that we were seeing it in our sleep. I thought the magic figure was three. I think (371a) the touchdown point was considerably different than this gentleman has testified to; the end of the runway vis-a-vis where the plane actually touches down was further away, I think.

The COURT. Let me just find that. On page eight of my opinion in this case, I found that the VASI device was set for a glide slope at an angle of three percent above the horizontal, which was the angle approved by the F.A.A., and we went into a discussion of the red lights and white lights and pink lights, all of which was testified to at great lengths, and the airlines testified that their pilots followed this glide slope. I found in the main they did, although they may have failed to occasionally, but substantially they followed it, so I would think that it is somewhat artificial to assume a lower glide slope than the evidence indicated actually occurred.

Mr. DEMAYO. If your Honor please, may I point out something? We have a photostat of the exhibit that was entered by the City of New Haven, Defendant's Exhibit A-7, Eastern Airlines, showing the glide slopes for Tweed-New Haven Airport. The only one that is any different is the fifty to one that is the threshold for the ultimate runway for the (372a) next expansion which they claim is not going to happen. They are also fifty to one. I think the three percent is not at variance with the fifty to one.

Mr. FRECHETTE. I am sure it is.

Mr. DEMAYO. The three percent is a more gradual one they use with the VASI if they are using it.

The COURT. I can't recreate the case, and I have already made my findings. I am going to have to go by that. I am satisfied there was ample evidence to support the finding that the glide slope was three percent. Now, how much difference this makes in my opinion I don't know. It happens that this height factor is the most important of these three factors, the one to which you attribute the greatest weight, and if the glide slope were, in fact, three percent as I found it was instead of two percent, I don't know how much higher that makes the plane or whether it makes any real difference.

By The Court:

Q. I don't suppose you have computed that, have you? A. I have not, your Honor.

The Court. Maybe you ought to try to before (373a) you get through. It may not make any practical difference on these properties.

I am through, Mr. Frechette, excuse me.

By Mr. Frechette:

Q. I did want to talk about one other question. You have taken this fifty to one, whatever it is, from the end of the runway, have you not? A. I have.

Q. Not from the touch-down point? A. That is correct.

Q. You know there is a difference? A. Yes.

Q. You know they are geared to come down at the touchdown point, not at the end of the runway? Do you know that? A. Yes.

Q. So that would make them even higher under your formula? A. Yes.

Q. Because the height is the important thing, it would have a further variance on your figures, wouldn't it? A. It could, yes.

Q. It would, wouldn't it? A. Depending on the distance, it would have a slight deviation.

Q. It would affect it, wouldn't it? A. Yes.

Q. So Judge McLean would have no question in his mind, I thought you told me before that you have no knowledge of what airplanes were involved in this Atlanta test, isn't that so? A. No specific knowledge, that is so.

Q. What I started to do with you before is this: If you take the airport in 1915 with the subject houses the way they are; in other words, there is no airport, just vacant land; you are not going to have to depreciate that land at all because of airport purposes, are you? A. I would say probably not.

Q. It is not there, so you can't, can you? A. Right.

Q. You wouldn't depreciate it for something not there, would you? A. No.

Q. But when you get to 1931 and there is an airport there, is it your testimony you wouldn't depreciate these properties in 1931 merely because of the airport? A. Considering the type of aircraft in 1931?

Q. In 1931, would you depreciate it as an expert in this field? A. I would say probably not.

Q. O.K. Then it would mean nothing to you as to what these zoning laws of the properties that are adjacent and close to the subject properties, isn't that so? A. This is not so.

Q. How can you square your prior answer to me in which it would make no difference for market value in 1931 when an airport was there? A. It depends on the highest and best use of the property, if it is consistent with the zoning. It has to be consistent with the zoning.

Q. That has nothing to do with the neighboring property, does it? The highest and best use has nothing to do with value on the neighboring property?

Mr. DeMayo. If your Honor please, I will make the same objection I made earlier, that the operation of an airport in 1915 or 1931 is considerably different than forty years later. There is no possible way that that question can be accurately answered or answered with any attempt at being professional.

The Court. I will let him answer it anyway he likes.

Do you want it read back?

The Witness. Please.

The Court. Please read the question.

(Whereupon, the pending question was read by the Court Reporter.)

A. It does.

By Mr. Frechette:

Q. If the use isn't good, it depreciates it, doesn't it? A. It may, yes.

Q. And a real estate expert in 1931 with these properties would have to depreciate them as far back as that because of the existence of the airport, according to you, wouldn't he? A. Not necessarily, Mr. Frechette.

Q. Wouldn't he probably do it? A. He might.

Q. Wouldn't the prudent real estate appraiser foresee airplanes coming into an airport? A. Yes.

Q. For that reason, according to you, wouldn't he depreciate it, or don't you think it has any effect on it at all? A. It definitely has an effect, but you have to consider the circumstances as of that time.

Q. Does it have an adverse effect? A. In 1931?

Q. Yes, sir. (377a) A. Considering the properties we are talking about today, it may not have had an adverse effect in 1931. I do not know. My guess is it would not.

Q. Taking it up to 1951, would it have an adverse effect then? A. On the properties we are discussing?

Q. Yes. A. Probably not.

Q. Did you know in 1951 that the runways were paved, that the 2200 runway was 4,771 feet, and there were commercial flights coming in? A. Yes.

Q. You say that had no effect on — A. (Interposing) I am talking about the stuff down along the water.

Q. I am talking about these eight properties we are discussing. Is it your testimony that they were not affected by the aircraft use in 1951? A. Some of them may very well have been.

Q. May very well have been? They were, weren't they? A. Yes, some were.

Q. How much? A. I cannot say.

Q. What percent? A. I cannot say.

Q. Five percent? A. I do not know.

Q. Taking this to 1960, would they be affected at that time? A. Yes, somewhat.

Q. All of them would, wouldn't they, according to your theory? A. I would have to do an investigation, Mr. Frechette.

Q. In other words, is it your testimony you don't know? A. In 1960, I do not know.

Q. You are unprepared as an expert in this field to venture an opinion as of 1960, is that so? A. That is not so. Some properties would be affected.

Q. Which ones? A. Those closest to the airport, closest to the end of the runway directly under the flight path of the airport.

Q. Which ones? Tell us which ones were affected in 1960? A. I would say 52 South End Road may have been affected, 735 Silver Sands Road, 6 Canna Drive.

Q. That's all? A. Yes; 25 Holmes Street possibly.

Q. In 1960, they were affected, is that right? A. I would say they were.

Q. Did you know we had scheduled commercial flights coming in at that time? A. I don't recall.

Q. That would be important to your determination as to whether or not they would be affected? A. Definitely. I am assuming they were.

Q. If they were coming in at that time, it would affect the value of them? A. Yes.

Q. How about in 1965 when you get up to perhaps ten flights a day from one and four from another, would that have an adverse effect on the subject properties we are here about today? A. Yes.

Q. Quite frankly, any real estate man would forsee this coming because of the zoning analogy from 1931 on, wouldn't he? A. Yes.

Mr. Frechette. Thank you. May I have just a moment to look over my notes, if it please the Court?

The Court. Yes.

(Pause.)

By Mr. Frechette:

Q. Are you familiar with Walters' study of the effect of jets on airports? A. Yes, I am.

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Q. Do you agree with this? A. With respect to the study he prepared for Chicago, I would say he is probably correct.

Q. Denver? A. I am not acquainted with his Denver study.

Q. Dallas? A. I am not acquainted with that.

Q. At least the one you are acquainted with is Chicago? A. I have read three of his articles.

Q. He said that they did not depreciate, is that correct? A. Yes.

Mr. Frechette. Your Honor, I have one other question I can't think of at the moment.

The Court. Very well. We will adjourn now for lunch. You can think of the question over the lunch hour, and you can ask it when we get back.

If it is feasible, it would be helpful to me if Mr. Heberger could study these computations and see how much effect there would be, if any, if we assume a three percent glide angle instead of a two percent, and if we assume that planes touch (381a) down 200 feet from the end of the runway — is that the figure — rather than at the exact end of the runway, I would like to know that. It may be those variances from the actual facts of this case don't make much of any difference in the theoretical results but if you could figure it out, fine.

The Witness. I can.

Mr. Frechette. May I ask one more question?

The Court. All right.

By Mr. Frechette:

Q. Is it a fair statement that this area — and by, "This area," I mean south of runway 2200, the Morgan Point area — as a general thing shows as much real estate activity as other areas? A. By other areas, you mean the City or Town of East Haven?

Q. Anywhere from West Haven through Branford. A. I would say activity is reduced in that area as compared to the general New Haven area, compared to the Town of East Haven as a whole and the general New Haven area.

Mr. Frechette. Thank you.

The Court. We will adjourn until 1:30. That will give us a little extra time.

(Whereupon, a recess for lunch was taken at 12:20 o'clock p.m.)

(382a)

AFTERNOON SESSION

1:30 O'CLOCK P. M.

EDWARD F. HEBERGER, resumed the witness stand, testifying further on his oath as follows:

Cross-examination continued by Mr. Frechette:

Q. Mr. Heberger, isn't it a fact in the Macon study they took into consideration 60,000 flights per year? A. Yes.

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By The Court:

Q. What is the Macon study? A. That was the study, your Honor, that was the basis of the original article with the military air base.

Mr. Frechette. Thank you. You may inquire.

Redirect examination by Mr. DeMayo:

Q. During the recess, Mr. Heberger, in accordance with his Honor's suggestion, did you recompute the damage figures you came up with earlier, assuming in every case the three percent as opposed to the previous two percent computation? A. Yes, I did.

Q. With one exception, I believe you did this? (383a) A. Yes.

Q. What was the exception? A. The exception was the Amendola property at 2 Meadow Place where, according to the graphs and charts that were introduced into testimony at the previous hearing, there was a twenty to one glide angle.

Q. There was a different runway? A. Yes.

Q. To your knowledge, it does not have any VASI indicator or any other landing guides? A. That is correct.

Q. For the ones you did recompute to make a Schedule A, I guess, would you tell his Honor what differences resulted first with the computation for Erle Jones, 52 South End Road? A. All right. With respect to 52 South End Road, I computed a damage of $2,250.

Q. So there is a difference of $50, is that correct? A. Yes.

Q. Meadow Place, we did not recompute, is that right? A. There is no change.

Q. Exhibit 4, Leslie Monroe, 110 Morgan Avenue, was there a difference there? A. Yes. The damage was $2,843. I suggest rounding it to $2,850.

(384a)

Q. The 114 Morgan Avenue, Mr. Monroe's other parcel? A. I came up with a damage of $2,062, which could be rounded to $2,050 or $2,100.

Q. And the 25 Holmes Street property, Michael Fusco? A. $2,503, which I recommend rounding to $2,500.

Q. And the Audette property, 735 Silver Sands Road? A. $2,184, which could be rounded to $2,200.

Q. And 72 Morgan Avenue, Michael Criscuolo? A. $3,217, which would round to $3,200.

Q. Finally, 6 Canna Drive, Mr. Guidone? A. $2,250.

Q. I note as you gave these revised figures, Mr. Heberger, that the differences are in most cases small differences. What does this indicate to you about the formula? A. Well, the formula is weighted to reflect various factors. I think it indicates that the formula is relatively realistic with respect to the particular properties in question.

Q. Which would further indicate to you it would take substantial distances to change the figures drastically? A. Yes.

Q. Just to clear up one thing that was touched upon by Mr. Frechette in his cross-examination and in answer to his Honor's questions about the situation that you attempted (385a) to evaluate with respect to the time of your appraisal, I believe you testified you read his Honor's judgment in this case, or decision? A. Yes, I did

Q. The 64-page document? A. Yes.

Q. You took this set of facts as described in this document into account when you performed these appraisals? A. They were taken into account, yes.

Q. And you also examined the neighborhood situations that were described in that document? A. Yes.

Q. Is it your best belief that you attempted to duplicate the situation that existed as of the time of which this judgment speaks? A. Yes.

Q. Now, Mr. Frechette asked you about your conversation with Mr. Hall. Did Mr. Hall indicate to you the extent to which he has put this formula to use?

Mr. Frechette. May I object to that, your Honor?

The Court. I will let him answer. I realize this is second hand.

A. He did not specifically mention the number of times. He said he has used it several times since.

(386a)

Q. In what parts of the country, did he indicate? A. No, he did not.

Q. At any rate, in your use of the formula prior to implementing it, did you do other independent reading in conjunction with your reading of the Hall-Beaton articles? A. Yes. I am not sure how many articles, probably thirty articles. I wrote to the Library of the National Association of Real Estate Boards and asked them to send me copies of any articles pertinent to the problem and any books they had on hand, which they did.

Q. Some place in your appraisal, I believe, you have defined the avigation easement you attempted to be guided by, is that correct? A. Yes.

Q. Is that definition in all of the appraisals? A. Yes, it is.

Q. Mr. Frechette questioned you with respect to residential property located near commercial property and sought to elicit a yes or no statement with respect to the effect on the residential property of the commercially zoned property. What would be some of the considerations that would have to be taken into account before you could make a definitive determination as to what the effect on residential was of a commercial zone nearby? A. Demand, growth factors, highest and best use the (387a) zone itself would have permitted.

Q. What about the possibilities that the commercial property nearby offers such as services that are not generally available to those residential properties, would that be a factor that should be considered? A. Yes.

Mr. DeMayo. I have nothing further.

Recross examination by Mr. Frechette:

Q. I did have one other question. Did you refigure the formula based on the point of touch down rather than the end of the runway? A. Yes. I made a 200-foot definition.

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Q. Was that in the figures you gave? A. Yes.

Mr. **Frechette.** I have nothing further.

Mr. **DeMayo.** I might just comment with respect to that that there was no evidence that I recall at the trial to indicate what the actual touch down point was nor that the touch down point was always the same. As a matter of fact, we had evidence quite to the contrary, as your Honor will recall.

Mr. **Frechette.** It makes no difference anyway.

(388a)

Mr. **DeMayo.** Did you take it into account?

The **Witness.** Yes.

Mr. **DeMayo.** I have nothing further.

Mr. **Frechette.** Nothing further.

(Witness excused.)

The **Court.** The Plaintiffs rest?

Mr. **DeMayo.** I have one short witness to put on, your Honor. I hope it is short. Mr. Nitz.

The **Court.** All right.

• • •

(423a)

Mr. **Frechette.** The Defendants rest.

The **Court.** Both sides rest?

Mr. DeMayo. Yes. The only thought I had was whether you would be interested in reading the appraisal journal that outlines this formula situation?

The Court. I think it will stick to the evidence at this hearing.

Mr. DeMayo. I would like to comment very briefly. I am not sure I can call this argument, but since the Defendants have rested, I would like to ask your Honor to take into account in particular your Honor's own observations with respect to these properties, and I think at page 28 of your Honor's decision, it sums up the situation about as succinctly as I could if I reproduce the testimony here.

Your Honor took into account on page 28 the testimony of these people, which I believe your Honor observed, was at all times assumed to be truthful and very candid. Despite any claims by the City of New Haven and the airlines their planes flew in these neat, regular little patterns, we had a multitude of contradiction to those claims, and your Honor I think felt this because on page 28 (424a) you say that this is a theoretical standard not invariably adhered to, and I think this was a general trend of the testimony.

I think your Honor took this into account in filing — and properly so, I claim — there was a taking.

The Court. That was with respect to the Audette property?

Mr. DeMayo. Yes. This is true of other people. Other people testified what they estimated the distances to be. I think the only thing we are here for today is to determine not whether there was a taking, but the value of that taking.

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Now, I submit to your Honor that to indulge in the niceties of this appraisal world and assume they can prove these things to the last nickel, basically I think it is obvious the appraiser's methods are inexact at best.

Since I have tried this case last fall, I have been in Court with respect to redevelopment property in the Town of East Haven, and I am aghast and amazed at the fantastic differences appraisers can come up with on the same piece of property, utilizing different methods.

Mr. Parente and I spent several days in Court (425a) this past week and had a 100 percent discrepancy between two apparently unbiased, unprejudiced appraisers. We had $88,000 from one appraiser and $173.000 from another. You couldn't believe it was the same piece of property when it was described. For this reason, the attempts to reconsider these entirely on the basis of market data are not entirely infallible.

I submit to your Honor that what we have attempted to do with the formula is something that may be novel, it may be different, but if you take the basic concepts of the formula and ask yourself what it basically attempts to do, I think it is the closest thing to a standard measuring, the closest thing to a standardized set of conditions we have come up with in the appraisal field, and this is merely a part, but I think it is much more reliable than looking at a list of sales and purchases and not having before us the other factors which determine why people buy houses, why they sell houses, why certain properties move, why certain properties don't move. I am convinced after listening to these appraisers testify that no one can properly evaluate all of these sales and give any substantial credence to the varying (426a) factors that go into them, and I claim that this formula represents the closest thing to a valid measuring stick that applies equally to all properties under all conditions.

The one thing I point out to your Honor is I am aware of the fact that my two appraisers weighted two of these factors differently in assigning the weight, but the total they put to them was not different. The 50 percent for height was the same as the original, and the two other factors which Mr. Heberger explained to your Honor that he assigned different weights to was because he felt they were more significant in this situation than the other, but the sum total is the same, and the three elements are the same.

I think Mr. Heberger was very candid in pointing out to your honor he had taken an approach on a hard, cold line without taking into account the peculiarities of this situation, what the market data indicated might be trends and he would not be using sound judgment and sound principles, so he attempted to apply less weight to certain of those factors.

I feel we have given the Court a logical, a (427a) plausible, and a fairly accurate gauge of what we claimed all along these people have been damaged by, no matter what Mr. Parente says, and I respect him as a gentleman and an appraiser.

I heard these people. The fact is we heard them testify in the Courtroom, and we know what they look like, and you heard them testify, and I think they impressed you with the fact they had something to talk about and were deprived of something. Mr. Heberger makes the point that the sum total of the prices which these people started with has been reduced by one. I think we have given your Honor something to be guided by.

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The Court. May I ask one question: In Exhibit 2, which is the appraisal report on 52 South End Road, Mr. Jones' gas station, he winds up by saying that as of January 1, 1969, the subject property had a market value of $25,000 which was reduced by the taking to $22,700, or a difference of $2,300. Those figures were changed very slightly after lunch today, and the damages claimed were reduced to $2,250 instead of $2,300, but the value prior to the taking is still $25,000.

The fact is as I found and as shown by the evidence at the trial was that on January 2, 1969, (428a) this property was sold by Mr. Jones for $25,000, so how has he been damaged?

Mr. DeMayo. Well, I think the problem there was — maybe I should address this to Mr. Heberger, but it is too late for that — he had disposed of the property while this was in Court, and the continuing situation which your Honor heard described to you in 1970 had terminated as to him, his inability to put up with it a year before, so there has to be a projection backward to countenance Mr. Jones' selling. It was also indicated by Mr. Jones that included in that $25,000 sales price was something for equipment.

The Court. No. The sales price was 27-5 to which he ascribed $2,500 to the personal property, leaving $25,000 to the real estate. He said that at least twice.

Mr. DeMayo. I honestly don't remember that.

The Court. It appears on page 238 of the record which I will show you.

Mr. DeMayo. I am sure your Honor is correct.

The Court. Of course, the testimony goes on and on and on, and he was asked about it again on cross-examination, but to the best of my knowledge and belief, he never waivered from the fact he got (429a) $27,500, and $2,500 was for — I think at one point he said he got $27,000 and $2,000 of it was for personal property, but he never waivered from the fact that what he got for the real estate was $25,000. If I missed some answer, whether he changed that, please let me know, but I don't think he did.

I said in my opinion on page 55 that if Jones can prove because of the flights he received less for the property which he sold than he would otherwise have received, an easement may be granted binding on the purchaser and Jones may be compensated for it. I said that in reliance on one case which much to my surprise so held.

Now, leaving out the question as to whether you have proved that the purchaser paid less than he otherwise would have paid, which is what you have to prove under that case, leaving that to one side, the evidence is he sold it for exactly the figure which your expert says was its fair market value before the taking.

Mr. DeMayo. I would have to concede, your Honor, that would indicate he did not suffer that $2,300 worth of damages in view of the fact it had been sold, and —

(430a)

The Court. It indicates in my mind he didn't suffer any damage. If you can find some place where he changed the figures in his testimony, please let me know and I will read it again, but certainly on page 238 he said that flatly, that $25,000 was the building and real estate, and I am sure he re-

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peated that later on, so as far as I can see at the moment, Mr. Jones is out.

Now, as to the others, the evidence here this time certainly has more to support the experts' opinion than it had last time, and I am interested to see that the figures as to damages are considerably lower than your previous expert testified to. Granted that no expert is infallible and no formula is perfect, still I feel as I said in my opinion, that these people have suffered some damage. I will give Mr. Frechette a chance to tell me why I shouldn't accept substantially the figures which this present witness or expert has testified to.

Mr. FRECHETTE. I think for this reason, if it please your Honor, and this is subject to my recollection of the evidence, I think both of the Plaintiffs' witnesses said the same phrasing, the results were inconclusive in analyzing comparable (431a) sales. I think basically that is what Mr. Parente said the first time, and I think basically that is the fact; there is no conclusion to be drawn from the evidence in this case as to what happens to market values near the airport. I wouldn't want to live near the airport, your Honor, but perhaps your Honor wouldn't want to live on the corner of Edgewood Avenue and hear the buses go by, but it hasn't hurt the market value of my house.

Your Honor took an arrow from my quiver. I cite Jones as authority for the proposition that the formula does not work, and this is quite frankly the reason I stayed away from that on my examination. They said before the taking the value was $25,000, that is what he got. The formula didn't work for Jones. The formula doesn't work.

Why doesn't it work? That formula that has been put forth before your Honor takes into consideration nothing that is in this small regional airport. Your Honor will recall the evidence about 20 flights per day. There aren't. I think at the most there are 14, but taking 20 times 365 comes out to about 7,000. This formula is based on a military operation of 60,000 flights per year. (432a) There is no similarity.

The Court. Well, I found there was a taking with respect to certain Plaintiffs. You don't have to agree with that, but so far that is what I found.

Mr. Frechette. I understand that.

The Court. I found it on the basis of the number of flights we have in this case.

Mr. Frechette. For these purposes, I agree with your Honor. Your Honor has found the taking and should measure damages, and this is a hearing in damages.

What I am suggesting is that the formula used by the Plaintiff's witnesses does not apply to this airport. There is nothing similar about it. It takes into consideration ten times the amount of activity there is here for the measure of damages, and in the one place we can measure the formula's effectiveness, is sales, and I would point out to your Honor the formula that has been used here has never been used to your Honor's information in any courtroom; it has never been used by these two witnesses in a courtroom. Your Honor is hearing something published in a journal. Quite frankly, I had something published in a law journal, and I (433a) hope won't be used in a courtroom. All a journal article is is that somebody has an idea and they run it in a journal. It is not

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proof of anything. The proof of this thing, which they all agree to, is cost, comparables and income. Everybody, Parente and the other two, throw out income; it didn't apply. The cost, we have no problem. We agree for the purposes of argument how much it cost to build a house, and we agree on market value with one exception. The thing we get into is where is the value of taking? They can't substantiate the formula with sales, and they admit they can't. In fact, I objected to the offer of proof, and your Honor sustained me.

The COURT. You can't disprove it with sales either.

Mr. FRECHETTE. Yes, you can. I respectfully cite Jones. That is proof to the contrary. What does Mr. Parente say — and I cannot disprove it except for Jones. Jones in my opinion disproves it.

I think Mr. Parente's candid comment disproves it, which is the two houses that were sold there went from $58,000 to $70,000. That in my judgment disproves it.

The other thing I am relying on is Mr. Parente's * * *

(460a)

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(624a)

VOL. 7 — DEFENDANT'S APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

THE TOWN OF EAST HAVEN, ET ALS
Plaintiffs
vs.
EASTERN AIRLINES, INC., ET ALS
Defendants

Civil Action No. 12175

MOTION TO DISMISS

Pursuant to the Federal Rules of Civil Procedure, the defendant The City of New Haven hereby moves this court to dismiss the complaint of Michael Fusco, Leslie Munro, Earl W. Jones, Michael Criscuolo, Alphonse Guidone, Jr., Leon Amendola and Louis G. Audette for the following reasons:

1. As to the plaintiffs Michael Criscuolo and Alphonse Guidone, Jr., the principle of res adjudicata applies and they are barred from recovery.

2. As to the plaintiffs Michael Fusco, Earl W. Jones, Alphonse Guidone, Jr., Louis G. Audette and Leslie Munro, their claimed damages are insufficient to invoke the jurisdiction of this court.

3. As to the plaintiffs Michael Criscuolo and Leon Amendola, there is no federal question involved and the jurisdiction should be in the State court.

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Dated at New Haven, Connecticut, this 21st day of September, 1971.

Defendant City of New Haven
By /s/ Roger J. Frechette
Roger J. Frechette
Its Attorney

Service certified pursuant to Rule 12a of F.R.C.P.
/s/ Roger J. Frechette
Roger J. Frechette

(625a)

NOTICE OF MOTION TO DISMISS

Please take notice that the defendant, The City of New Haven, will bring its motion to dismiss before the United States District Court for the District of Connecticut for a hearing on the 24th day of September, 1971, at 2:00 p.m. at New York, New York, or as soon thereafter as counsel may be heard.

Dated at New Haven, Connecticut, this 21st day of September, 1971.

Defendant City of New Haven
By /s/ Roger J. Frechette
Roger J. Frechette
Its Attorney

This is to certify that a copy of the within has been mailed this 21st day of September, 1971 to:

Anthony V. DeMayo, 129 Church St.,
New Haven, Conn., and
Tyler, Cooper, Grant, Bowerman & Keefe
205 Church Street, New Haven, Connecticut
/s/ Roger J. Frechette
Roger J. Frechette

(626a)

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

1. The defendant The City of New Haven is once again raising the defense of res adjudicata as to the two plaintiffs Michael Criscuolo and Alphonse Guidone, Jr., as both of them were plaintiffs in the original suit in the Superior Court in the State of Connecticut in which they, through their lawyer, admitted they could prove no damages and consequently the Superior Court awarded them no damages, all of which was filed as a special defense and the complaint and judgment of the state court case were offered and accepted as exhibits in this case.

2. As to the plaintiffs Michael Fusco, Earl W. Jones, Alphonse Guidone, Jr., Michael Criscuolo and Leslie Munro, both in their answer to interrogatories and their appraiser's testimony their damages do not attain the required jurisdic-

tional minimum of this court and as a result thereof their cases should be dismissed.

City of Boulder v. *Snyder*, 396 F.2d 853 (10th Cir., 1968), *cert. den.* 393 U.S. 1051;

Jaconski v. *Avisum Corporation*, 359 F.2d 931 (3rd Cir., 1966);

F & S Construction Company v. *Jensen*, 337 F.2d 160 (10th Cir., 1964).

(627a)

3. As to the plaintiffs Amendola and Criscuolo their remedy, if any, lies in the state court inasmuch as they are Connecticut residents and this defendant is a municipal corporation in the State of Connecticut and they have not made any allegations of violation of federal statutes or the federal Constitution which would place jurisdiction in this court as opposed to the state court. This defect also applies to all plaintiffs.

Defendant City of New Haven
By /s/ Roger J. Frechette
Roger J. Frechette
Its Attorney

Service Certified pursuant to Rule 12a of F.R.C.P.
/s/ Roger J. Frechette
Roger J. Frechette

(628a)

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

THE TOWN OF EAST HAVEN, ET AL
Plaintiffs
— *against* —
EASTERN AIR LINES, INC., ET AL
Defendants

Civil Action No. 12175
January 9, 1968

AMENDED MOTION OF THE CITY OF NEW HAVEN TO DISMISS AND FOR OTHER RELIEF

The City of New Haven ("defendant") respectfully moves the court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the action on the ground that the court lacks jurisdiction in that the action does not arise under the Constitution and laws of the United States, there is no diversity of citizenship, exclusive jurisdiction of plaintiffs' action if any is vested in the Civil Aeronautics Board and the Federal Aviation Administration of the Department of Transportation, defendant is immune from plaintiffs' action if any, and the court lacks the power to grant the relief requested.

(629a)

3. To dismiss the action on the ground that the plaintiffs have failed to join the United States of America, the Civil Aeronautics Board and all owners, users and operators of aircraft at the airport, which are indispensable parties.

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4. To dismiss the action of plaintiff Town of East Haven on the ground that it is not the real party in interest as required by Rule 17 (a) of the Rules of Civil Procedure.

5. To dismiss the action of plaintiff Town of East Haven on the ground that it does not have the capacity to sue in a representative capacity.

6. To dismiss the action of plaintiffs New Haven-Committee Against Airport Expansion and East Haven-Committee Against Airport Expansion on the ground that they are not the real parties in interest as required by Rule 17 (a) of the Rules of Civil Procedure.

7. To dismiss the action of the plaintiffs New Haven-Committee Against Airport Expansion and East Haven-Committee Against Airport Expansion on the ground that they do not have the capacity to sue in a representative capacity.

8. To dismiss the action of plaintiff Michael Rascati on the ground that he is not the real party in interest as required by Rule 17 (a) of the Rules of Civil Procedure and does not have the capacity to sue in a representative capacity.

9. To strike plaintiffs' prayer for money damages on the ground that the complaint fails to state specifically items of special damage as required by Rule 9 (g) of the Rules of Civil Procedure.

10. To dismiss the complaint insofar as it purports to be a class action on the grounds that the plaintiffs do not constitute a class, the persons plaintiffs purport to represent are not so numerous as to make it impracticable to bring them all before

the court, and the character of the right alleged to be enforced is not comprehended within Rule 23 (a) of the Rules of Civil Procedure.

11. To dismiss the complaint on the ground that there is improper venue and failure of service of process.

The Defendant City of New Haven
By Thomas F. Keyes, Jr.
Its Attorney

(631a)

MEMORANDUM IN SUPPORT OF MOTION OF DEFENDANT CITY OF NEW HAVEN, CONN. TO DISMISS AND FOR OTHER RELIEF

I. *Jurisdiction*

Plaintiffs have recognized in their Memorandum in Support of Plaintiffs' Motion to Add Defendant[1] that in adding the City of New Haven as a defendant diversity jurisdiction under 28 USC Sec. 1332 is wholly defeated, which of course it is.

Plaintiffs allege no jurisdiction of the City of New Haven under 28 USC Sec. 1343. Therefore, the sole possible ground for this court's jurisdiction owed the City of New Haven is under 28 USC Sec. 1331:

> "(a)The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

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[1] Neither the Memorandum nor Motion was served on The City of New Haven. The Court's action granting the motion was without the benefit of a response by the City.

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Plaintiffs seek no injunctive relief against the City as, indeed, plaintiffs cannot, since there is nothing the City could do to stop the present or future "turbo-jet and jet operations of the defendants to and from the Tweed-New Haven Airport."[2]

Plaintiffs' claim against the City are solely the claims of alleged trespass, nuisance, and "taking". Trespass and nuisance involve no federal question.

The question, then, is whether each of the plaintiffs have sufficiently alleged a cause of action as to the City of New Haven which (a) exceeds $10,000 and (b) arises under the Constitution, laws, or treaties of the United States.

Looking beyond the conclusory allegations of paragraphs 18, 19, 20, 25, 29, and 33, we find no statement constituting a claim which arises under the Constitution, laws, or treaties of the United States.

There is no reference to any federal law or treaty under which the plaintiffs have a claim against the City of New Haven. The reference to the Fifth Amendment to the Constitution of the United States must be considered an inadvertent mistake since the Fifth Amendment applies to the federal government and not to the City of New Haven.

The question is thus reduced to whether each of the plaintiffs have sufficiently alleged a "taking" of each of their "property" by the City of New Haven in violation of the Fourteenth Amendment.

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[2] The City of New Haven is obligated by federal law and its grant agreements with the FAA to keep the airport open for all users.

The New Haven-Committee Against Airport Expansion and the East Haven-Committee Against Airport Expansion must clearly be dismissed as plaintiffs against the City of New Haven because neither of these plaintiffs have any "Property" which even allegedly could be "taken" by the City of New Haven.[3]

The remaining plaintiffs at least allegedly have "property", with the exception of Plaintiff Michael Rascati who has already stated in a deposition before this court that he does not own any property which allegedly was "taken". As to these remaining plaintiffs, the court must decide whether the complaint sufficiently alleges a "taking" under the Fourteenth Amendment.

Even if plaintiffs have sufficiently alleged a "taking", which as shown below they have not, the law is clear that since plaintiffs would have adequate redress under state law there is no violation of the Fourteenth Amendment of the Federal Constitution. The Fourteenth Amendment was intended to protect a citizen against state action which is in accordance with state law and therefore no redress on the state's courts would be available. Plaintiffs believe and have stated that the City of New Haven has "deprived the plaintiffs of their rights and privileges guaranteed by the laws and Constitution of the State of Connecticut. . . ." (Paragraph 33 of Amended Complaint). If so, plaintiffs can and must go to the courts of Connecticut for redress. They have no federal claim under the Fourteenth Amendment.

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[3] To the extent that the Committee claim to represent persons having "property" which could be "taken", the property-holding persons are the real parties in interest who must bring the action. Rule 17 (a), Federal Rules of Civil Procedure. This same rule forbids the action by the named plaintiffs who claim to bring their action on behalf of "those similarly situated." Para. 4 of Amended Complaint.

In *Barney* v. *New York*, 193 U.S. 430 (1904), plaintiff claimed that the routing of a rapid transit railroad in front of his house was a "taking" under the Fourteenth Amendment as well as illegal under state law. The Supreme Court held that the Fourteenth Amendment applies only where the state's action is lawful under state law. If state law is violated, plaintiff's "rights remain in full force and may presumably be vindicated by resort to the laws of the state for redress." 193 U.S. at 439.

II. *Failure to State a Claim of "Taking"*

Even if the Fourteenth Amendment were available to plaintiffs, plaintiffs have not sufficiently alleged a "taking" of their property. Certainly the complaint of the Town of East Haven must be dismissed since paragraphs 15 and 16 of the Amended Complaint allege only that it is "affected by" the operations conducted at the Airport. This does not constitute a showing that the property of the Town of East Haven has been "taken" by the City of New Haven.

Nor does the statement of the other plaintiffs in paragraph 17 of the Amended Complaint constitute a showing that their property has been "taken" by the City of New Haven. The "expansion" of the runways did nothing to the plaintiffs.

The Plaintiffs' claim of taking comes down to the allegation of "frequent operation" of commercial turbo-jet and full jet aircraft "in close proximity to and over the plaintiffs' properties". Plaintiffs have tried but failed to state a claim under the *Causby*[4] and *Griggs*[5] cases.

Plaintiffs have done no more than suggest a possible interference with their use and enjoyment of their property and a depreciation in its value. In *Batten* v. *United States,* 306 F.2d 580 (1962), the Court of Appeals for the Tenth Circuit analyzed the *Causby* and *Griggs* cases and held that a "taking" which constitutes a federal constitutional claim must be "so complete as to deprive the owner of all or most of his interest in the subject matter." 584-85 An unconstitutional "taking" of plaintiffs' home requires that government action has made it "uninhabitable".

Plaintiffs have not therefore adequately alleged a "taking" of their property. Plaintiffs have wholly failed to state a federal claim upon which relief can be granted. The complaints against the City of New Haven in this Court must be dismissed.[6]

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[4] *United States* v. *Causby,* 328 U.S. 256 (1946).

[5] *Griggs* v. *Allegheny County,* 369 U.S. 84 (1962).

[6] The other claims of trespass and nuisance are not federal claims. In any event, plaintiffs have not sufficiently alleged even these claims. Moreover, there is no showing that the City of New Haven committed any physical invasion of plaintiffs' property or injured plaintiffs or acted other than in a valid governmental capacity. See *Wiggins Airways* v. *Massachusetts Port Authority,* 362 F.2d 52 (C.A. 1, 1966).

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III. *Indispensable Parties*

Plaintiffs' Amended Complaint is vitally defective because it has failed to join the United States, the Civil Aeronautics Board and all users and operators of aircraft at the Airport.

The United States must be joined because if there has been any "taking", it is the United States which took the airspace including "airspace needed to insure safety in take-off and landing of aircraft." 49 U.S.C. Sec. 1301 (24). The commercial flights of which plaintiffs complain were in the airspace taken by the United States, not by the City of New Haven. This cause, thus, cannot be resolved without joining the United States.

The air carriers' operation of jets and turbo-jets is pursuant to order of the Civil Aeronautics Board. The Civil Aeronautics Board must be joined as an indispensable party.

Finally, the operations of the air carriers are but a fraction of the total daily operations at the airport. The other owners, users and operators of aircraft at the airport must be joined since it is they, and not the City of New Haven, who have trespassed against plaintiffs, if there be trespasses.

IV. *Class Action.*

If plaintiffs have an action under *Griggs,* then there certainly can be no class action under Rule 23 of the Rules of Civil Procedure.[7]

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[7] *Speed* v. *Transamerica Corporation,* 5 F.R.D. 56 (D. Del., 1945).

Those property owners whose property has been invaded and "taken" can be fully identified. They are not so numerous as to make it impracticable to join the suit.

Plaintiffs seek damages from the City of New Haven for invasion of their property. The question of whether the criteria of *Griggs* have been satisfied will vary as to each and every plaintiff. (637a) The aircraft frequency, altitude, noise etc. will vary as to each property allegedly invaded. There is no "common" question of law or fact. Each plaintiff's case, in effect a condemnation case, must be judged by its own facts as to whether there has been a "taking", and if so, the extent thereof.

Finally, no plaintiff can be awarded a judgment for taking of property other than his own. Title must be strictly proved in a condemnation case. This court cannot order the City of New Haven to pay damages to anyone except the true owner of the property taken. The court cannot determine damages for taking of property except as to property before the court, the value of which is strictly proved. Clearly, the court must order that the action against the City of New Haven cannot be brought as a class action.

V. *Special Damage*

Rule 9 (g) of the Rules of Civil Procedure provides,

> "When items of special damage are claimed, they shall be specifically stated."

Plaintiffs have not given the City of New Haven notice of the specific damages to each of their respective properties allegedly "taken" by the City of New Haven.[8] The sweeping

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[8] *Kuenzell* v. *United States,* 20 F.R.D. 96 (N.D. Calif., 1957).

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generalities of paragraphs 15 and 16 (plaintiffs are "affected by" the operation of the airport) and paragraph 17 of the Amended Complaint ("substantially interfered", "substantially depreciated", "caused fear, etc.", "threat to the lives, etc.") do not begin to appraise the City of New Haven of the items of special damage to each property allegedly "taken". Without items of special damage there is no proper allegation of a "taking".

(638a)

MOTION TO DISMISS AND FOR OTHER RELIEF

Defendant City of New Haven respectfully moves that this honorable Court dismiss the claims of plaintiffs and for other relief as shown below:

I.

FAILURE TO CLAIM $10,000 JURISDICTIONAL AMOUNT

On June 16, 1970, the Court denied defendant City of New Haven's motion to dismiss plaintiffs' complaint for failure to claim the $10,000 jurisdictional amount, and the Court gave plaintiffs an opportunity to amend their answers to interrogatories to claim, if they could, $10,000 damages for taking of their property. The Court said,

> "It (the motion to dismiss) can be renewed if it should become anything less than academic." Tr. 48-49.

(639a)

Pursuant to leave of leave of Court, plaintiff filed on August 1, 1970, a Supplemental Answer to Interrogatories, a copy of which is attached hereto as Appendix A, and a letter of plaintiffs' real estate appraiser, Mr. McKeon, dated July 31, 1970, a copy of which is attached hereto as Appendix B.

This submission constituted the plaintiffs' "one last opportunity to be specific" on the matter of their claims. Tr. 46 The plaintiffs are bound by and limited to their August 1, 1970 statements. The Court expressed its doubt as to whether any plaintiff would be "so ill-advised as to not get his figures above $10,000." Tr. 48.

The following plaintiffs have neither claimed themselves, nor in the opinion of their real estate appraiser sustained damages in excess of $10,000:

	Claim in Supplemental Answer to Interrogatories	*Mr. McKeon Estimated Damages*
Alphonse G. Guidone, Jr.	$6,000.00	$6,000.00
M. James Canali	$5,000.00	$5,000.00
Salvatore Criscuolo	$8,700.00	$8,700.00
N. Leo Coronoa	$4,500.00	$4,500.00
Andrew Proto	$5,000.00	$5,000.00
Louis G. Audette	$9,000.00	$9,000.00
Earle W. Jones	$9,000.00	$9,000.00
Michael Rascati	No answer*	$5,000.00
Michael Fusco	$7,200.00	$7,200.00

(640a)

It now appears to a "legal certainty" that the foregoing plaintiffs cannot recover an amount above the jurisdictional minimum of $10,000.00. *City of Boulder* v. *Snyder*, 396 F.2d 853 (10th Cir., 1968). *cert. den.* 393 U.S. 1051; *Jaconski* v.

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Avisun Corporation, 359 F.2d 931 (3rd Cir., 1966); *F & S Construction Company* v. *Jensen*, 337 F.2d 160 (10th Cir., 1964). Accordingly, their complaints should be dismissed.

> 37. Other than as enumerated in answer to interrogatories 5 and 24 (damages or depreciation to plaintiffs' property), do plaintiffs claim any injury, loss, cost or damages to them or any one or more of them has resulted from the activities of the defendant airlines?
>
> 38. If the answer to the interrogatory 37 is affirmative, please state the following:
>
> A. The identity of the party claimed to have suffered the injury, loss, cost of damages;
>
> B. The nature of the claimed injury, loss, cost or damages;
>
> C. An estimate of the value of the injury, loss, cost or damage claimed to have been suffered.

II.

NO SPECIFICATION OF ANNOYANCE AND SUFFERING DAMAGES

On June 16, 1970, the Court denied defendant City of New Haven's motion for specification of damages by plaintiffs, and gave plaintiffs "one last opportunity to be specific on this subject":

(641a)

> "The Court. I think I'll start fresh on this, because now we are facing a trial. And I think I'll give the plaintiffs one last opportunity to be specific on this subject. So I'll say that by a certain date, and we'll decide upon the date in a minute, the plaintiffs may file supplemental

> answers which will change if they wish, what they said before with respect to what they claim as the value of the property taken. *If they claim what we refer to loosely as a damage for annoyance and suffering, they should specify some figure that each of them claims for that, or whatever value that may be. . . .* Tr. 46 (Italics added).

Defendants Eastern Airlines and Allegheny Airlines had addressed the following interrogatories to plaintiffs on the subject of injury, loss, cost or damage other than "taking of their property":

Interrogatory 37 was answered in the affirmative, but no responsive answer was given to interrogatory 38. Plaintiffs' Answers served February 21, 1969.

On April 1, 1969, Eastern and Allegheny moved to require a further answer to interrogatory 38, which motion was granted. On August 7, 1969, plaintiffs filed Further Answer to Interrogatories which referred to depreciation of their property and repeated the language of the complaint: *i.e.*, plaintiffs still did not specify their damage.

This Court's order of June 16, 1970, extended to plaintiffs "one last opportunity to be specific on this subject." As the Court will note in reviewing Plaintiffs' Supplemental Answer to Interrogatories, served July 31, 1970, plaintiffs have still failed to specify their damages resulting from the alleged fear, damage, annoyance, and inconvenience to the plaintiffs and their families, and from the alleged continuing threat to the lives, health, tranquility, safety and comfort of the plaintiffs and their families.

Accordingly, defendant respectfully requests that the Court strike all such allegations from plaintiffs' complaint, dismiss plaintiffs' complaint insofar as it relates to alleged fear, damage, annoyance, inconvenience and threat to the lives, health, tranquility, safety and comfort of plaintiffs and their families, and enter an order barring plaintiffs from presenting evidence or otherwise prosecuting any claim for damages or injunctive relief relating to alleged fear, damage, annoyance, inconvenience, and threat to the lives, health tranquility, safety and comfort of the plaintiffs and their families resulting from the alleged acts of defendants.

III.

APPRAISOR—:REPORTS

The Court was initially reluctant to order plaintiffs to provide defendants with full appraisor reports "with all the data that a real estate appraiser would normally refer to in giving the basis of his opinion." Tr. 47.

It was represented to the Court that plaintiffs had agreed they would produce their real estate appraisor reports, and plaintiffs' attorney Mr. DeMayo stated that a report of "what he (the real estate appraisor) is going to testify to on the stand" would be delivered to defendants in advance of trial. Tr. 100.

The Court, accordingly, established August 1, 1970 as the date "for the plaintiffs to deliver to the defendants copies of their real estate expert appraisals of these respective pieces of property." Tr. 101.

The only report delivered to defendants is Mr. McKeon's letter of July 31, 1970, a copy of which is attached hereto as Appendix B. This letter is clearly not an appraisal report. It is far from what the real estate appraiser "is going to testify to on the stand", which plaintiffs' attorney agreed to produce and which the court ordered be produced by August 1, 1970. There is no basis for the opinion set forth; no description of the property, no comparable sales, legal description, photographs and the like.

Defendant respectfully requests the court to order that plaintiffs are barred from producing evidence at the trial by any real estate appraiser, or in the alternative, order plaintiffs to produce full and complete real estate appraisals of each of the properties in issue within three days of the court's order.

The Defendant City of New Haven
THOMAS F. KEYES, JR.
ROGER J. FRECHETTE
ROBERT M. BECKMAN

August 13, 1970.

REPLY

BRIEF

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72-1187

Supreme Court
FILED
APR 7 19
MICHAEL RODAK, JR

In the

Supreme Court of the United States

JANUARY TERM, 1973

No.

The City Of New Haven,
Petitioners,
v.
The Town Of East Haven, et als.,
Respondents.

RESPONDENTS' REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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New Haven, Conn. 06510
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THE MACK CO., NORTH HAVEN, CONN.

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In the

Supreme Court of the United States

JANUARY TERM, 1973

No.

THE CITY OF NEW HAVEN,
Petitioners,
v.
THE TOWN OF EAST HAVEN, ET ALS.,
Respondents.

RESPONDENTS' REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONSE OF THE RESPONDENTS, THE TOWN OF EAST HAVEN, ET ALS, TO PETITION OF THE CITY OF NEW HAVEN.

The Respondents respectfully urge that the petition be denied for the following reasons:

1. It does not present a substantial federal question;

2. It is basically an attempt to re-try numerous issues of fact already passed upon by the District Court and the Court of Appeals.

Further, the Respondents do not agree with the "Statement of the Case" submitted by the Petitioner in that it recites a series of conclusions, allegations and errors, representing the Petitioners interpretation of evidence and actual errors of fact.

The Respondents set forth below their own "Statement of the Case" and rebuttal of the six arguments made by the Petitioner.

STATEMENT OF THE CASE

This was an appeal by the defendant City of New Haven from an award of damages for inverse condemnation made to the Respondents, six owners of property located in the area adjacent to the Tweed-New Haven Airport.

A brief background history of the airport will serve to enhance one's comprehension of the decision appealed from, the claims of law and the factual allegations.

Originally operated in 1931 as a turf airport catering to the few private planes then owned and operated in the area, the airport began to take on its present configuration in 1941 when two paved runways were constructed. The "prevailing wind" runway runs north and south and is identified as Runway 2-20. Crossing Runway 2-20 and running northwest to southeast is Runway 14-32. Runway 14-32 was constructed 4,100 feet long and has not been extended. Runway 2-20 has become the main runway and is used by all of the larger commercial planes. It was extended from 4,200 feet to 4,771 feet in 1951. Its further expansion in 1967 by 829 feet to its present length of 5,600 feet prefaced certain litigation between the Town of East Haven and residents of East Haven

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and New Haven on the one hand and the City of New Haven and the airlines on the other.

Use of the airport has roughly followed the overall pattern of air travel development, attracting more flights and bigger planes as both commercial and general aviation activity increased.

The first commercial airline at Tweed-New Haven commenced operations in 1934, terminated in 1937, resumed in 1941 and terminated again in 1942. American Airlines returned to New Haven in 1946 and departed in 1960. Smaller private planes have always used the airport.

With the advent of turbo-prop and jet aircraft, the operation and use made of the airport took on a different character.

In 1965, Allegheny Airlines commenced the use of turbo-prop planes, a variety of which is currently in use. At the time of trial, Allegheny's operations consisted of ten flights per day.

Eastern Airlines has operated at New Haven since 1950. However, in 1967 it replaced its propeller driven craft with turbo-props and pure jets — DC-9s and Boeing 727s. The use of the jets was discontinued after only two months, and in 1969, all Eastern operations ceased. In June, 1970, Eastern resumed its jet operations and at the time of trial, it was making four jet flights per day at Tweed-New Haven.

As is clearly indicated in the opinion of the trial judge (*Town of East Haven* v. *Eastern Airlines, Inc.*, 331 F. Supp. 16, 19-21) the airport has grown steadily and its use and traffic have increased drastically. The character of the planes using it changed from propeller craft to turbo-props and jets.

Even the so-called "small" planes comprising the category of "general aviation" were frequently jet powered.

Of the individual parties awarded damages, Michael Fusco's property is directly north of Runway 2-20 and every plane landing from north to south, or taking off from south to north, passes over his property or some portion of it. His property lies in part in East Haven and in part in New Haven.

Leslie Munro owns properties at 110 and 114 Morgan Avenue, East Haven, Michael Criscuolo owns 72 Morgan Avenue and Alphonse Guidone, Jr. is the owner of 6 Canna Drive, East Haven. These properties are to the south and slightly west of Runway 2-20. Planes landing from the south and taking off from the north pass over Munro's properties. Incoming planes pass over the Criscuolo property but only the Eastern planes appear to fly any pattern, with the others approaching his property in assorted routes. The Guidone property is also subjected to direct overflights, but since it is some blocks closer to the airport, the planes pass much lower over it.

The Audette property is also at the southern end of Runway 2-20, just slightly to the east of a line extending from its southern terminus. It was from this property that motion pictures were taken and some of the sound tests were recorded.

While the Amendola property is located at the southeasterly end of Runway 14-32 which is not generally used by the larger commercial planes, he is subjected to frequent direct overflights. He also had the experience of a private corporate plane crashing in his front yard.

This suit sought damages for trespass and nuisance as well as a "taking" in violation of the Fifth and Fourteenth Amendments. The Respondents further sought injunctive relief and

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compensation for fear, annoyance, inconvenience and interference with their peace and quiet.

It should be noted that even while this case was pending, changes effected at the airport had a direct bearing on the plaintiffs' allegations as to the negligent and unsafe operations of the airport. For example, the control tower was not installed until December 1969 and the "VASI", a landing aid, was not installed until June 1970. A portion of the complaint was specifically directed at the airport's lack of these and other safety and efficiency devices.

This suit was originally brought against the Administrator of the Federal Aviation Agency, Eastern Airlines and Allegheny Airlines. In the course of preliminary hearings, Judge Timbers indicated that the City of New Haven was a necessary party and the Petitioner was subsequently added as a party defendant. The Administrator's Motion to Dismiss was granted by Judge Timbers in an opinion which was somewhat critical of the failure of the FAA to consider the complaints of the Respondents. Consequently, the action proceeded and went to trial with the two airlines and the City of New Haven as defendants.

ARGUMENT

I.

The Doctrine Of Griggs And Causby Should Be Upheld And An Airport Operator Should Remain Liable For The Activities It Sets In Motion.

The City's argument that it should be exculpated from liability for the taking of the avigation easement because it was the airlines and the United States Government who were the actual "takers" is in direct conflict with the rule established in *Griggs* v. *Allegheny County,* 369 U.S. 84 (1962). At page 89 of its opinion, the Court in that case stated:

> "It is argued that though there was a 'taking', someone other than respondent was the taker — the airlines or the C.A.A. acting as an authorized representative of the United States. We think, however, that respondent, which was the promoter, owner, and lessor of the airport, was in these circumstances the one who took the air easement in the constitutional sense. Respondent decided, subject to the approval of the C.A.A., where the airport would be built, what runways it would need, their direction and length, and what land and avigation easements would be needed. The Federal Government takes nothing; it is the local authority which decides to build an airport vel non and where it is to be located. We see no difference between its responsibility for the air easements necessary for operation of the airport and its responsibility for the land on which the runways were built. Nor did the Congress when it designed the legislation for a National Airport Plan."

The argument that the City cannot close the airport even if it wanted to comes too late for relevancy. Its inability now to close the airport comes from its initial election to construct it and to make use of federal funds. Thus, it is its contractual obligations only, arising from the use of such funds, and its election to participate in the National Airport Plan, that now prevent it from abandoning the Airport.

Nothing in the Federal Airport Act or the National Airport Plan requires any local community to proceed to construct an airport in the National Airport Plan. See 14 Code of Federal Regulations:

> "Section 151.3 National Airport Plan.
>
> (a) Under the Federal Airport Act, the FAA prepares each year a 'National Airport Plan' for developing public airports in the United States, Puerto Rico, the Virgin Islands, and Guam. In terms of general location and type of development that is necessary to provide a system of public airports adequate to anticipate and meet the needs of civil aeronautics.
>
> (b) . . . Only work on an airport included in the current Plan is eligible for inclusion in the Federal-aid Airport Program to be undertaken within currently available appropriations and authorizations. However, the inclusion of an airport in the National Airport Plan does not commit the United States to include it in the Federal-aid Airport Program. In addition, *the local community concerned is not required to proceed with planning or development of an airport included in the National Airport Plan.* (Italics ours)"

Other than its announced preference for passing its legal responsibility on to someone else, the Petitioner has advanced no legal (or logical) basis justifying a departure from established law.

II.

THE TRIAL COURT, FOLLOWING THE CAUSBY DOCTRINE, FOUND THERE WERE OVERFLIGHTS AND THAT THERE WAS A TAKING.

The City's contention that the Respondents failed to satisfy the "overflight" requirements which constitute a "taking" as defined by the doctrine first proclaimed in *United States* v. *Causby*, 328 U.S. 256 (1946) is unequivocally refuted by the facts and by the analysis of the *Causby* doctrine set out in the trial Judge's opinion (331 F. Supp. 16, 30-33, inclusive).

That the trial Judge recognized and followed the requirement of "overflights" is obvious from his opinion. At page 32 he stated:

> "Not only must flights be over the land, they must be frequent and low. Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."

His adherence to the requirement of "overflights" is further demonstrated by his statement that the great majority of cases concerned with application of *Causby* have held that although annoyance and damage caused by activities on an adjacent airfield may be real, they do not constitute a "taking" and by the following quotation from his opinion:

> "Although there is thus no decision directly binding on me as to how *Causby* should be interpreted, I feel that only cogent reasons should induce me to depart from the great weight of federal authority in other circuits. I have not found a sufficiently compelling reason to do so." (at p.32).

In adhering to the requirement of "overflights" and applying the same to the facts proven in the present case, the trial Judge found that some of the plaintiffs in the suit had failed to satisfy the requirement. As to them, he stated:

> "As to some of the plaintiffs, the task is not difficult. Clearly, there was no taking of the properties of Corona, Proto or Salvatore Criscuolo. Their complaints are directed essentially to the disturbance created by taxiing planes and planes idling on the runway and at the terminal. This sort of damage comes directly within several

> of the decisions previously cited. It is consequential damage which does not rise to the Fourteenth Amendment level." (*Op.* p. 32)

In the next paragraph of his opinion, the Court found that two of the other plaintiffs had failed to prove that the overflights were frequent. As to Messrs. Camarota and Canali, the Court found:

> "Camarota's properties on Morgan Terrace are not in the direct flight path of the incoming and outgoing planes. As far as the evidence shows, it was on only a very few occasions that a plane went near or over his property. This is not often enough to satisfy the requirement of frequency. The noise and soot from the planes that passed by within earshot but not over his property did not constitute enough of a direct and immediate interference or constitute a taking within the *Causby* rule." (At p. 32).

And as to the Canali property, the Court found:

> "Private planes occasionally fly over his house and commercial airlines have done so on 'several occasions' in the past four or five years, only in bad weather. This is not frequent enough. On all the evidence, I conclude that the evidence . . . does not meet the *Causby* test." (At p. 33)

As to the other plaintiffs, those awarded damages, the Court found:

> "Although the question is close, I conclude, on all the evidence, that there was a sufficiently direct and immediate interference with these plaintiffs' use and enjoyment of their land to constitute a taking." (At p. 33)

The evidence supports the trial court's conclusions and his award of damages.

All of the plaintiff-appellees testified that they and their properties are subjected to direct overflights and to resultant annoyances and damage. For example, when asked whether the planes pass over his house, Mr. Amendola testified that he could actually "see the rivets when they fly over our house." Trial Tr. p. 288 (See also Trial Tr. p. 289) When Mrs. Audette was asked on redirect examination whether there were times when the planes pass directly overhead, she responded that there were. On direct examination she testified several times that the planes go directly over her property. (App. pp. 34a, 37a, 41a) The fact is undisputed that the trial court accepted the testimony that her house was in a direct line with the north-south runway. Trial Tr. p. 419 (App. p. 37a) Proof of overflights (App. p. 37a) can be shown for all the plaintiff-appellees. They all testified that their properties were subjected to direct overflights: Mr. Criscuolo's testimony concerning overflights is contained on Trial Tr. pp. 113, 114, 116, 120, 122; Mr. Fusco's is on Trial Tr. pp. 419, 421, 422 (App. pp. 26a, 28a); Mr. Guidone's testimony to overflights can be read on Trial Tr. pp. 378, 379, 394 (App. pp. 31a, 32a, 33a); and Mr. Munro's testimony to overflights can be read on Trial Tr. pp. 191, 193, 197. (App. pp. 19a, 20a, 23a)

The plaintiff-appellees also testified of interference with the use and enjoyment of their properties as a result of these overflights. Most testified that conversations had to stop when the planes flew overhead. Some testified that their homes and properties were subjected to oil spots, soot and fumes. Mr. Munro testified that the damage was so frequent he was replacing his glass windows with plexiglass whenever one was broken and that he has already had over $200. worth of broken windows. (App. p. 20a) Mr. Guidone testified that the sheet rock between the walls and the ceiling was constantly cracking.

This repetition of the credible evidence on the basis of which the court reached its conclusions serves no purpose as it is all in the transcript. Mr. Amendola's testimony can be found on Trial Tr. pp. 289, 290; Mrs. Audette's is on Trial Tr. pp. 418, 419, 420; Mr. M. Criscuolo testified to interferences on Trial Tr. pp. 113, 114, 116, 117, 119; Mr. Fusco's testimony to the interference is seen on Trial Tr. pp. 262, 266, 269; Mr. Guidone's testimony can be found on Trial Tr. pp. 380, 382, 383, 384, 386, 388; and Mr. Munro's testimony concerning interference can be found on Trial Tr. pp. 193, 195, 196, 197.

It is apparent that the Court had ample evidence to support its conclusion that each of the Respondents had suffered substantial interference with the use and enjoyment of her or his property, and that such interference was the direct result of overflights, or flights "so very close to these properties . . ., as to make it seem like unrealistic nitpicking to deprive these plaintiffs of the benefit of the *Causby* rule."

The defendant City also contends that *Causby* requires "substantial diminution". (Def. Brief p. 11) That this is not true is noted twice in the opinion. The first time, on page 262, when the Court stated:

> "There is no material difference between the supposed case and the present one, except that here enjoyment and use of the land was not completely destroyed. *But that does not seem to us to be controlling.* (Italics ours)

Again, on page 266, the Court stated:

> "As stated in *United States* v. *Cress*, 243 U.S. 316, 328, '. . . it is the character of the invasion, not the amount of

> damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking'."

Counsel for the Respondents has been unable to find any case to support the Petitioner's argument that one's property must be destroyed before a taking can be found.

Being unable to carry on conversation, being aroused from sleep, having one's house shaken, having windows shattered, being unable to hang clothes out to dry and having one's house swimming pool coated with soot would appear to be justifiable items of complaint.

By arguing with facts already found, counsel for the Petitioner is seeking to re-try the case. Hence, Respondents have not reprinted the numerous pages of testimony already found of evidential significance by two courts. However, excerpts from such testimony are included in the Respondents' Appendix.

III.

FEDERAL JURISDICTION WAS PROPERLY INVOKED BY THE PLAINTIFF-APPELLEES AND THE FEDERAL JURISDICTIONAL REQUIREMENTS WERE MET.

The Petitioner has made a wholesale attack on the jurisdiction of the federal courts to entertain the present action, which attack was rejected in the District Court by both Judge Timbers and Judge McLean.: Both Judges held that the jurisdictional requirements of 28 U.S.C. Sec. 1331(a) had been met.

In the first instance, the City makes the claim that even if the facts in the case present a federal question, the federal courts should stay their hand until the State Courts have acted on the State constitutional question raised by Paragraph 33 of the Plaintiff-Appellees Amended Complaint, wherein they alleged:

> "In addition, the defendant, acting under color of state laws, grants, and licenses, have deprived the plaintiffs of their rights and privileges guaranteed by the laws and constitution of the State of Connecticut, in violation of the Fifth and Fourteenth Amendment to the Constitution of the United States."

The City's position is that a determination must first be made by the State Courts on the allegation that the State Constitution had been violated before the federal courts can adjudicate the federal issues. As support for this contention, the City places great reliance on *Barney* v. *City of New York*, 193 U.S. 430 (1904). District Court Judge Timbers, in denying the City's claim, summarized the City's position and correctly enunciated the present state of the law as follows:

> "The City of New Haven, however, claims that this Court lacks jurisdiction because, if the plaintiffs' property has been taken, such a taking is also a violation of Connecticut's constitution and laws, and plaintiffs must, therefore, first seek redress in a state court. This very contention was rejected by the Supreme Court in *Mosher* v. *City of Phoenix, supra.* The plaintiff in that case sought to restrain the City of Phoenix, Arizona, from appropriating her land for purposes of a street improvement project. She alleged in her complaint filed with the District Court for the District of Arizona that the city was 'attempting to take and appropriate the property of plaintiff without compensation, and to take and appropriate and use same and deprive the said plaintiff of the permanent use thereof without due process of law, or any process of law, . . . and in violation of the rights of plain-

> tiff as guaranteed her under the Constitution of the United States, and particularly under amendments five and fourteen thereof, which plaintiff here and now pleads and relies on for her protection against the wrongs and threatened wrongs of the defendant City in the proposed taking of her property as hereinbefore described.' *Id.* at 31. But because the plaintiff also alleged that the city's action violated state law, the Court of Appeals for the Ninth Circuit affirmed dismissal of the complaint by the District Court for lack of a substantial federal question, noting that the city's action did in fact appear to violate state law. *Mosher* v. *City of Phoenix*, 54 F.2d 777 (9th Cir. 1931) The Supreme Court, however, held that the dismissal was improper: 'We are of the opinion that the allegations of the bill of complaint that the City acting under color of state authority was violating the asserted private right secured by the Federal Constitution, presented a substantial federal question and that it was error of the District Court to refuse jurisdiction. 287 U.S. at 32.' This case is controlling here." (App. pp. 7a, 8a)

Further, Judge Timbers went on to cite ***United States*** v. ***Raines***, 362 U.S. 17 (1960) as authority for the fact that although *Barney* has never been directly reversed or overruled, it is of not continuing authority. He specifically referred to pages 25 and 26 of the ***Raines*** opinion which contains the Supreme Court's discussion of *Barney*:

> "The appellees can draw no support from the expressions in *Barney* v. *City of New York* . . . The authority of those expressions has been 'so restricted by our later decisions', see ***Snowden*** v. ***Hughs***, (321 U.S. 1, 13 (1943), that *Barney* must be regarded as having been worn away by the erosion of time, *Tigner* v. ***Texas***, 310 U.S. 141, 147, and of contrary authority. See ***Raymond*** v. ***Chicago Union Traction Co.***, 207 U.S. 20, 37; *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U.S. 278, 283-289; *Iowa-Des*

Moines Nat. Bank v. *Bennett*, 284 U.S. 239, 247; *Snowden* v. *Hughs, supra; Screws* v. *United States*, 325 U.S. 91, 107-113, 116. *Cf. United States* v. *Classic*, 313 U.S. 299, 326. It was said of *Barney's* Doctrine in *Home Tel. & Tel. Co.* v. *Los Angeles, supra* at 284, by Justice White: '(its) enforcement . . . would . . . render impossible the performance of the duty with which the Federal Courts are charged under the Constitution'." (App. pp. 8a-9a)

Support for Judge Timbers' holding is also found in C. Wright, Federal Courts 185 (2d ed. 1970) in which Prof. Wright says of *Barney*:

> "A case . . . had seemed to hold that an action unauthorized by state law could not be state action for purposes of the Fourteenth Amendment. This decision has no continuing authority. It was settled . . . that action by a state officer claiming to act under authority of the state can be enjoined, even if the state has not authorized such action." (citing *Home Tel & Tel. Co.* v. *City of Los Angeles, supra* and *United States* v. *Raines, supra*)

Notwithstanding the correct application by the District Court Judges of the principles affirmed by the U.S. Supreme Court in *Raines*, the City maintains that the federal court should abstain from granting a forum to the plaintiff-appellees because remedies were available to them in the state court. This argument of the City's was correctly refuted by Judge Timbers who referred to the case of *Martin* v. *Creasy*, 360 U.S. 219 (1954) in which the three abstention doctrines were reviewed and then stated "but unlike *Martin*, the circumstances which would merit abstention are not present in the instant action." (App. p. 9a)

Even stronger language rejecting the defendant City's contention is found in the case of *Lave* v. *Wilson*, 307 U.S. 268, 274 (1939) in which the U.S. Supreme Court said:

> "Barring only exceptional circumstances or explicit statutory requirements resort to a federal court may be had without exhausting the judicial remedies of state courts."

The Eighth Circuit Court's position on this contention is stated in *Dove* v. *Parham*, 282 F.2d 256, 262 (8th Cir. 1960):

> "Judicial remedies of state courts for indication of federal constitutional rights do not have to be exhausted, before there can be resort to a federal court, unless some federal statute so requires as to a particular legal situation."

Similarly, in *Amsley* v. *West Virginia Racing Commission*, 378 F.2d 815, 817 (4th Cir.) *cert. denied* 397 U.S. 974 (1970), the Fourth Circuit Court stated:

> ". . . it is well settled that resort to a federal court may be had without first exhausting the judicial remedies of state courts."

The City's next attack on the Court's jurisdiction is based on the contention that none of the plaintiff-appellees had a chance to approach damages over $10,000. This statement is patently incorrect as is evidenced by the supplemental Answers to Interrogatories sworn to on October 2, 1970. Both District Court Judges to whom this jurisdictional issue was addressed, after listening to all parties and examining all the pleadings concluded that the plaintiff-appellees had succeeded in their burden of proving that an amount-in-controversy in excess of the required amount was present.

The Petitioner contends the action should have been dismissed for want of jurisdiction because the plaintiff-appellees failed to prove their claims that they were damaged in excess of the required amount. *Saint Paul Mercury Indemnity Co.* v. *Red Car Company*, 303 U.S. 283 (1937) provides the legal basis for the complete rejection of that contention. In that case the United States Supreme Court stated that "the inability of plaintiff to recover an amount adequate to give the Court jurisdiction does not . . . oust the jurisdiction." *Id.* at 289. It is now well settled law "that jurisdiction is not lost because the award is for less than the jurisdictional amount." C. Wright, Federal Courts 111 (2d ed. 1970).

It is conceded that courts do have the authority to dismiss for want of jurisdiction when it appears to a *legal certainty* that the plaintiff cannot recover the amount which he had demanded. *Saint Paul Mercury Co.* v. *Red Cab Company, supra.* Such legal certainty, however, does not arise merely from the impressions obtained from the evidence adduced that the claimant may not be entitled to recover as much in damages as he requests in his ad damnum. Even if a Judge receives impressions, on the trial or the hearing of a cause, that it appeared to a *moral certainty* that the issue did not substantially involve a dispute or controversy within the jurisdiction of that Court, he would not be justified in dismissing for want of jurisdiction. *Barry* v. *Edmunds,* 116 U.S. 550 (1886). The requirement that it appears to a legal certainty that no recovery can be had for an amount equal to or in excess of the jurisdictional minimum is the generally accepted and sound principle of law.

The Third Circuit Court applied that principle in *Wade* v. *Rogala,* 270 F.2d 280, 284 (3rd Cir. 1959) when it stated that:

> "unless the court were convinced that the plaintiff was never entitled to the jurisdictional amount, and his claim was therefore asserted only for the purpose of gaining jurisdiction dismissal on jurisdictional grounds would not be justified."

In 1964, the Third Circuit Court again applied the principle of *Gullborg* v. *Rizzo*, 331 F.2d 557, 561 (3rd Cir. 1964) when it said:

> "The test is applied in limine: only when it appears with legal certainty that the claim cannot possibly reach the requisite level will the action be dismissed . . ."

The Fifth Circuit Court's acceptance and adherence to this principle is evidenced by *Anderson* v. *Moorer*, 372 F.2d 747, 750 (5th Cir. 1967) where the Court stated:

> "The plaintiff has alleged that more than $10,000. is in issue, and such allegation, if in good faith, is sufficient unless it appears to a legal certainty that recovery cannot exceed the jurisdictional amount."

The Fifth Circuit Court again applied the principle in *Jones* v. *Landry*, 387 F.2d 102 (5th Cir. 1967).

Even more pertinently, this Court applied the principle in *Deutsch* v. *Hewes St. Realty Corp.*, 359 F.2d 96, 101 (2d Cir. 1966) when it said:

> "Though it may seem unlikely that plaintiff will be able to substantiate that she should recover damages in excess of $10,000, on this record it is not clear to a legal certainty that she cannot do so: we ought not affirmatively decide more than that."

The *Deutsch* case further made it clear that in determining whether or not the requisite amount was present, the Court should not decide the merits of the case.

This latter concept was expressed by the United States Supreme Court in *Smithers* v. *Smith*, 204 U.S. 632 (1907) when it noted that the authority to dismiss is not unlimited and that "its limits ought to be ascertained and observed, lest, under the guise of determining jurisdiction, the merits of the controversy between the parties be summarily decided without the ordinary incidents of trial." *Id.* at 632.

Similar language was employed in ***Continental Casualty Company*** v. ***Department of Highways, State of Louisiana,*** 379 F.2d 673, 675 (5th Cir. 1967) where the Fifth Circuit Court stated:

> ". . . When the issue of jurisdictional amount is intertwined with the merits of the case, courts should be careful not to decide the merits, under the guise of determining jurisdiction, without the ordinary incidents of trial."

The Third Circuit Court expressed this principle when in *Jaconski* v. *Avison Corporation*, 359 F.2d 931, 935 (3rd Cir. 1966) when it stated:

> "Except in the plainest cases the issue of jurisdictional amount should not be decided if the ruling constitutes at the same time a decision on the merits."

The principle was expressed in slightly different language by the Fifth Circuit Court in ***Fireman's Fund Insurance Company*** v. ***Railway Express Agency,*** 253 F.2d 780, 784 (6th Cir. 1958) when it said, citing ***Land*** v. ***Dollar,*** 330 U.S. 731, 735 (1947):

> "Where the jurisdictional issue as to amount in controversy cannot be decided without the ruling constituting at the same time a ruling on the merits of the case, the case should be heard and determined on its merits through regular trial procedure."

Again, in ***Wade*** v. ***Rogala, supra*** at 285, the Third Circuit Court stated:

> "The necessary choice, except in the flagrant case, where the jurisdictional issue cannot be decided without

> the ruling constituting at the same time a ruling on the merits, is to permit the cause to proceed to trial."

Thus, it is clear that for Judge McLean to have dismissed the plaintiff-appellees' cause of action, he would have been required to find that it appeared to a legal certainty that the plaintiff-appellees would be unable to recover in excess of the amount-in-controversy requirement, and his decision would have had to have been made without ruling on the merits of the case. That no such legal certainty appeared to Judge McLean is apparent on page 32 of the transcript of the pretrial hearing held on October 6, 1970, when he stated:

> "As I said before I have not ruled and I am not ruling now on whether emotional disturbance, fear, mental anguish or whatever you want to call it is the proper element of damages in these cases or not but it does seem to me that the plaintiffs should be permitted to claim it and let me take the testimony on it and let me make my decision on the basis of the record rather than doing it in a vacuum."

Accordingly, the plaintiff-appellees contend that federal court jurisdiction was properly invoked and that the District Court Judge did not err in rejecting the City's challenge.

IV.

THE DAMAGES SUSTAINED BY THE PLAINTIFF-APPELLEES HAVE BEEN PROVEN BY SUBSTANTIAL EVIDENCE AND WITH REASONABLE CERTAINTY.

The defendant's attack on the expert testimony of the two real estate appraisers disregards the elementary principle that it is the trier who determines the weight to be given to the evidence, evaluates the opinions of the expert witness and makes a choice between conflicting opinions.

A reading of the defendant-City's argument on the question of proof of damages would have one believe that the trial court had no basis whatsoever for its findings. The argument blithely ignores the factual conclusions reached by the Court on two occasions as well as the court's specific rejection of the testimony offered by the City's expert — that the plaintiffs had not been damaged at all by the airport activities. (331 F. Supp. 16, 34 and Suppl. Op. App. pp. 2a, 3a)

The court, having heard the plaintiffs, having viewed pertinent motion pictures (Op. p. 25) and having listened to actual tape recordings of airport operations (Op. p. 25) had substantial evidence before it to conclude that damages had been sustained. That conclusion being amply supported by the evidence, it was then only necessary to determine by competent testimony the actual amount of such damages.

It is respectfully submitted that an examination of the evidence before Judge McLean at the supplemental hearing compels the conclusion that his decision was based on both fact and law.

Qualifications Of The Experts:

Each appraisal prepared by Messrs. Heberger and Nitz (Ex. 2-9) contained a detailed statement of their educational and professional qualifications. Mr. Heberger testified he had qualified as an expert witness in Maine, Vermont, New York and Connecticut and taught appraising at the University of Connecticut. (P. App. p. 9a) Mr. Nitz, in addition to his professional qualifications, testified to having been involved in airport property acquisitions for the runway extension in 1966 and 1967. (App. pp. 11a, 12a)

Scope Of The Study:

Mr. Heberger stated that in arriving at his opinions, he had considered all three recognized approaches for the determination of value and that two of them (cost and market data) were ultimately utilized to arrive at the before and after values of the subject properties. (P. App. p. 12a) He then explained in detail the application of the factor formula which was carefully and thoroughly set forth in the individual appraisals. (Ex. 2-9) The court was also given the benefit of a demonstration and explanation using a theoretical example. (P. App. pp. 13a-20a)

Both experts testified to having previous knowledge of the geographical area in question and to having spent considerable time on the scene, examining properties, etc. (P. App. 30a-32a) A complete study of all real estate transactions in the area in question was made and analyzed with real estate in East Haven and surrounding towns. (App. p. 13a, 14a)

With respect to the formula factor, Mr. Heberger related he had read of this method of damage appraisal in articles authored by the developers of the method, (P. App. pp. 13a, 37a) and had discussed it with one of these men. (P. App. p. 37a) In preparing for the use of this formula factor, he had read an additional 30 articles in conjunction with the articles authored by the originators of the method. (P. App. p. 63a, 64a) Finally, it is clear from the testimony that the formula was not blindly applied but was adjusted to take into account local factors and the particular circumstances relating to each of the subject properties. That the formula, as used, was adjusted to local conditions, is manifest by the court's express reference to that fact in its Supplementary Opinion (App. p. 3a):

> "Hall (the developer of the formula) ascribed different weights to these factors, giving the greatest weight to the first, the height of the passing planes. Plaintiffs' experts agreed with this weighing in general, but varied somewhat the weight which Hall ascribed to the second and third factors in order to make the formula, in their opinion, more appropriate for this particular airport." (Data in parentheses ours)

An examination of the appraisals (Ex. 2-9) will clearly indicate the basis for the formula, the persuasive reasons for its use in measuring damages under the circumstances existing in this case and its relevance to the particular properties involved.

Confirming Opinions:

The court, having rejected the defendant City's expert's opinion of "no damage", gave credence to the confirming opinions of the plaintiffs' experts. Each of them testified that it was his considered professional opinion that the values evolved by use of the formula were consistent with and confirmed by his own expert opinion as to the damages. (App. p. 14a; P. App. pp. 21a, 22a)

Counsel for the defendant City cites *United States* v. *Merz*, 306 F.2d 39 (1962) as authority for its claim that the use of a formula for the purpose of determining value is inadmissible. (Defendant's Brief, p. 20) It is submitted that that case merely held that whether the use of a formula was then relevant or irrelevant was immaterial as it was not considered in determining the awards. The opinion expressly stated:

> "It may be conceded, arguendo, that the formula utilized by Willcox in appraising the damage to the several tracts resulted in arbitrary damage assessments which were irrelevant in determining fair market value after the taking. *Cf. United States* v. *Commodities Trading Corp., supra*; *United States* v. *Toronto, Hamilton & Buffalo Navigation Co., supra*; *United States* v. *Cors, supra*. It is apparent from its conclusion that the proper measure of damages was the difference between fair market value prior to the taking and fair market value after the taking, that the commission did not consider the formula testimony in arriving at its awards."

The cases in our courts each year are legion in which various methods of appraisal are employed by expert witnesses to arrive at their opinions of value, damages, etc. Capitalization of earnings is one example of use of a specific formula. One need only examine a typical condemnation case to see real estate appraisers utilizing various methods and formulas to arrive at their opinions of market values. The factors which comprise the method or formula for evaluation are all the result of the application of factual data, opinion and judgment by the expert. The ultimate test is the credence to be given to the expert's opinion. The method or means by which the expert arrived at his opinion is the criterion for determining the weight to be given to his testimony.

As indicated above, in the instant case the plaintiffs' experts did not blindly apply a mathematical formula to reach their conclusions. Being dissatisfied with what they felt was a lack of data after the taking to warrant the use of comparable sales as a pertinent means of appraising values, they resorted to another method. The method they used took into account the particular area, the problems complained of, pertinent market and cost data, the real estate history of the area, and the experts' own actual experience and knowledge. The subject formula was only used after adjusting it to the particular facts and circumstances peculiar to the local properties involved and the local airport.

As Judge McLean stated in his Supplemental Opinion:

> "We are dealing here with expert opinion. No opinion is necessarily conclusive. Use of this formula in an airport case, in the absence of any other pertinent data, seems to me to afford a reasonable basis for the experts' opinion. Since I have been given no further pertinent data here, I have decided to apply the formula which, incidentally, produces a result substantially lower than the opinion expressed by plaintiffs' expert at the trial, which I declined to accept. Under all the circumstances, I would not feel justified in rejecting plaintiffs' evidence in its entirety, as defendant suggests." (App. p. 4a)

The defendant would have you believe that the plaintiffs' experts used some general, non-specific, collection of unsupported bits and pieces of odds and ends. An examination of the plaintiffs' Exhibits 2-9 demonstrates beyond a doubt that those appraisals represent a most precise document prepared by the diligent application of pertinent facts, skill and care. Each parcel received the same treatment and had the same formula applied to it in the same way. This is in startling contrast to some of the known methods of appraisal which have factors conducive to diverse opinions. It is axiomatic that an appraiser can influence the final result in the computation of the value of property via the income approach method by his determination of such variables as:

1. Estimated vacancy allowance;
2. Rate at which a mortgage might be obtained;
3. Administrative costs;
4. Contingencies.

Frequently, the capitalization rate is computed differently by appraisers using the same basic data, but applying their own separate judgments to those areas where discretion is permitted.

"The "Ellwood Tables", published by the American Institute of Real Estate Appraisers, and used by appraisers in determining mortgage-equity capitalization, is another example of a use of formulas in the court room.

The plaintiffs have sought to standardize a difficult process and to take the guess work out of a controversial process. They should not be penalized because their approach is novel. The overall validity and general reliability of the formula, when adjusted to local conditions, is probably best demonstrated by examining the change in dollar amounts reflected by Mr. Heberger's recomputation to allow for a three per cent glide slope and a touch down point 200 feet further northward. (P. App. p. 62a) Very nominal changes in the dollar amounts resulted, indicating a stable measure reflecting substantial influences but not sensitive to minor deviations.

This valid, equitable and precise yardstick should not be discarded by a court system which is constantly striving to achieve precision and exactitude, but frequently is helpless to do so.

Although counsel for the Petitioner has represented to the Court on Page 19 of his brief that he has printed in its entirety, in his Appendix, the Respondents' testimony, the testimony of Mr. Nitz has been omitted. The Respondents have therefore included the same in their Appendix.

V.

THE DISTRICT COURT'S JUDGMENT IS IN ACCORD WITH THE APPLICABLE FUNDAMENTAL RULE OF LAW CONCERNING CERTAINTY AND CANNOT BE IMPUGNED.

The defendant City contends that the District Court's judgment is uncertain, but when this contention is examined in perspective, it is obvious that the main thrust of the argument is not with the uncertainty of the judgment but with the claimed uncertainty of the easement granted by the Court. The City's argument raises two issues: (1) Is the judgment uncertain and void because of vagueness? (2) Is the easement itself definitive enough to be valid? The plaintiff-appellees contend that the obvious answers to both issues sustain the propriety of the judgment; that the judgment itself is positive and certain and the avigation easement is a valid one.

First, the plaintiff-appellees agree that fundamental legal principles require that a judgment "should be complete and certain in itself, and that the form of the judgment should be such as to indicate with reasonable clearness the decision which the court has rendered, so that the parties may be able to ascertain the extent to which their rights and obligations are fixed," so that the judgment may be enforced in the manner provided by law. 46 Am. Jur. 2d Judgments, Section 67

(1969). However, when this basic rule is applied to the District Court's judgment, it is apparent that the judgment is in accord with it.

Together with other precise holdings, such as the dismissal of the action against the airlines and the dismissal of the claims of the Town of East Haven, the judgment contains a finding that as to six of the individual plaintiffs the defendant City's operation of Tweed-New Haven Airport substantially interferred with such plaintiffs' use and enjoyment of their property and caused damage to the value of the said properties. The judgment also determined that these plaintiffs were each damaged in certain monetary amounts and that on payment of those amounts, the defendant City would be granted an avigation easement. With such an easement, the City would be able to operate its airport as it had at the commencement of the suit, without any further legal interference by the plaintiffs. Accordingly, it is apparent that the rights and liabilities of the parties are clearly defined by the judgment and can be enforced by law. A restatement of such rights and liabilities shows that the defendant City is granted an easement which allows it to operate its airport in the same manner and to the same extent as the airport was operated at the time of trial. Further, the plaintiffs are required to refrain from taking any action, legal or otherwise, which would interfere with the City's exercise of its avigation easement, so long as that easement is properly adhered to. All of the prerequisites of a valid judgment are thus present in the District Court's judgment. All of the interests that were to be affected by this decision were adequately represented, unlike the case of *Watts* v. *Waddle*, 6 Pet. 389 (1832) in which the U.S. Supreme Court determined that the only way all of the interests to be affected by the decision could be adequately represented was if the court presumed that the husbands of the parties were dead and that their rights had become vested in their wives. Further, it cannot be persuasively claimed that the District Court's judgment is only understandable by a person who possesses specialized skills or knowledge in a particular field, as was the claim in the case of *Saline Branch Drainage Dist.* v. *Urbana-Campaign Sanitary Dist.*, 395 Ill. 26, 59 N.E.2d 251 (1946). Nor can it be logically contended that the judgment did not sufficiently designate in whose favor and against whom the verdict was rendered, as occurred in the cases of *Ferrell* v. *Simmons,* 63 W. Va. 45, 59 S.E. 752 (1907) and *Shriver* v. *Superior Court,* 48 Cal. App. 576, 192 P. 124 (1920).

The trial court's judgment was certain, and any and all challenges to its validity must fail.

The defendant City claims that the easement to which it would be entitled upon payment of the damages awarded to the individual party plaintiffs "is not defined as to length, width, height or actual use". It appears, however, that the defendant City is confusing the requirements of what plaintiff-appellees call a land easement with the requirements of an avigation easement. Where it might be considered necessary to describe a land easement with some degree of definitiveness concerning its width, length, height or actual use, such precision cannot be required when dealing with an avigation easement, particularly when the types and sizes of the pertinent properties involved are known. Unlike the properties involved in some airport cases, the properties involved in the present case are relatively small. It would be an impossible task to attempt to confine the overflight of the airplanes to one portion of a piece of property, for when one portion of any of these properties is affected, the whole property suffers from the same effects. Thus, the only possible construction concerning the width or length of the easements granted here, when viewed with regard to the sizes of these properties, is that the easements encompass the full length and width of each of the parcels of property involved.

Similarly, the supposed ambiguity as to the use of the easement is quickly disposed of by noting that all parties involved are aware that the easements were granted to facilitate the landing and taking off of airplanes from Tweed-New Haven Airport. Therefore, the contention that width and length dimensions are required for these avigation easements and that the actual use for which the easements were granted is unclear cannot be allowed to impeach the validity of the easements.

It is conceded that in some cases dealing with the granting of avigation easements, a minimum height is established below which airplanes are not allowed to fly and that in this case the District Court did not establish any minimum height. However, the plaintiff-appellees contend that to do so under the conditions here prevailing would have been impossible and that the absence of such minimum height does not affect the validity of the easement.

As the trial court noted on page 33 of its opinion, the testimony of some of the plaintiffs tended to be imprecise. Most of them referred to the overflights with relation to their houses rather than to the parcels of land on which the houses stand. Though these parcels of land are each quite small, the percentage of such land occupied by the houses themselves is even smaller. From this characterization of the testimony, the difficulties which faced the trial judge became readily evident. He was dealing with plaintiffs who had no special skills in judging heights of airplanes. The measurements they presented ranged from a low of 45 feet (Op. p. 24) to a high of 500 feet (Op. p. 22). The trial court did note, however, that the paths of incoming and outgoing planes are now controlled by the FAA control tower, and that although the path of the flights may vary slightly, "each landing should be like all others". (Op. p. 29) Thus in view of the imprecision of the plaintiffs' testimonies, if the trial court was required to determine minimum heights below which the planes would not be permitted to fly, such determination would necessarily be arbitrary. It appears that the Court decided that such a minimum height requirement was not necessary because the paths of the planes are now controlled by the FAA personnel and the essential purpose of the easement is to permit landings and takeoffs at Tweed-New Haven Airport.

A valid easement is created when the parties clearly indicate that it is their intention to grant such easement, and the land which is to be subject to the easement is clearly identified.

Saulsberry v. *Saulsberry*, 121 F.2d 318, 323 (6th Cir. 1941);

Miller v. *Snedeker*, 257 Minn. 204, 215, 101 N.W.2d 213, 222 (1960);

Sorrell v. *Tennessee Gas Transmission Company*, 314 S.W.2d 193, (Ky. 1958)

Even though the dimensions of the easement are not described, that fact or omission does not invalidate the creation of the easement.

Marin County Hospital District v. *Cicurel*, 154 Cal. A.2d 294, 299, 316, P.2d, 32, 38 (1957).

Nor can it be contended that some key word or words must be employed before an easement can be created, for as the Court in the case of *Camp Clearwater, Inc.* v. *Plock*, 52 N.J. Super. 583, 596, 146 A.2d 527, 535 (1958) quoting from 28 C.J.S. *Easements* Section 24 (1941) said:

> "No particular words are necessary to constitute a grant, and any words which clearly show the intention to give an easement . . . are sufficient to effect that purpose, provided the language is certain and definite in terms."
>
> See also 25 Am. Jur. 2d Easements and Licenses, Section 20 (1968).

It appears that the New York courts having adopted the above rule concerning so-called land easements, have extended it further by allowing an easement to be considered valid even though the precise land which is to be subjected to the easement is not definitively described. The appellate division, in the case of *Rosenberg* v. *People*, 12 Misc.2d 710, 172 N.Y.S.2d 845 (1958), was confronted with a challenge to the validity of an easement which was created by the following lower court judgment:

> "Judgment will be granted to the plaintiff determining that he held a good and sufficient title to the premises in question, subject to the covenant to grant to the State an aerial easement, together with an easement to construct piers or necessary columns for supporting the overhead structure of the New England Thruway." 12 Misc.2d at 712, 172 N.Y.S.2d at 848.

In examining the language of the judgment, it is readily apparent that the precise land subject to the easement for the columns was not described even remotely, yet the Appellate Division summarily dismissed the challenge by stating:

> "The appeal is from a judgment . . . directing the conveyance of easements therein to appellant . . . In our opinion, the judgment clearly defines the rights of the parties; it needs no clarification."
>
> *Rosenberg* v. *People*, 7 App. Div. 2d 929, 183 N.Y.S.2d 422, 423 (2d Dept. 1959).

Motion for leave to appeal the Appellate Division's decision was denied by the New York Court of Appeals, 6 N.Y.2d 706 (1959).

Thus it seems that the rule in New York today permits an easement to be considered valid if the whole property is described even though only a portion of that property will be affected directly by the easement. The plaintiff-appellees are not proposing, however, that this Court adopt the New York rule because it is unnecessary to go that far in this case. The District Court judgment conforms to the established rule as earlier noted. That judgment clearly indicates that it was the intention of the court to grant avigation easements to the defendant City which will subject the individual party plaintiffs' properties to direct overflight at a height deemed necessary by the FAA regulations as applied by the FAA personnel in the airport control tower. In its most basic form that rule can be stated as being:

> "In order to grant an easement it is necessary to describe both the land to be subjected to a use and the use to which the land is to be subjected." *City of Glendora* v. *Faus*, 146 Cal. A.2d 106, 307 P.2d 976 (1957).

The City further presses its argument that the easement is uncertain by stating that once the easement is granted the City should be given deeds which can be recorded on the land records showing that the City has taken such easements.

It claims that the District Court's judgment left too much undecided to allow such deeds to be given.

It is true that some cases have required the owner of the fee to issue to the holder of the easement a deed showing that such an easement exists. Those decisions have most notably come from the Court of Claims. However, it also appears that it is within the court's discretion whether or not it orders such a deed to be issued, for the Court of Claims in still other cases has not required the owner of the fee to issue such deeds. To support the discretionary nature of such deed requirement, the plaintiff-appellees call this Court's attention to the air aviation cases of:

> *Aaron* v. *United States*, 311 F.2d 798 (Ct. Cl. 1963);
>
> *Hyland Park, Inc.* v. *United States*, 161 F. Supp. 597 (Ct. Cl. 1958).

However, even if this Court concedes to the City's contention that it should be given a deed, there is nothing to prevent the issuance of a deed, with the easement described therein either in the language of the District Judge when he said, at Page 34 of his opinion:

> "The easement . . . is a permanent easement for the operation of a similar number of turbo prop planes and jet planes of the size presently used, *i.e.* DC-9s and Boeing 727s,"

or in the following language: "a permanent easement is granted to the City of New Haven for the operation of ten turbo prop flights per day and four DC-9 and Boeing 727 flights per day at a height necessary to insure a safe taking off or landing." Either one of the two descriptions should be considered definite enough to satisfy all of the defendant's misgivings. Finally, the defendant can record the judgment itself in the proper land records.

The plaintiff-appellees contend that the actions of the parties both prior and subsequent to the issuance of a deed or easement can be used to clear up any ambiguities of which either party complains. "In construing an instrument conveying an easement the rules applicable to the construction of deeds generally apply."

> *McManus* v. *Sequoyah Land Associates,* 240 Cal. A.2d 348, 353, 49 Cal. Rptr. 592, 595 (1966).

The California court then proceeded to state that ". . . the acts of the parties under and pursuant to an instrument afford one of the most reliable means of arriving at their intentions." This position was also followed by the Court in *Belcher* v. *Elliott,* 312 F.2d 245, 248 (6th Cir. 1963) when it stated: "The conduct of the parties, after the execution of the deed, may be considered as an aid to its practical interpretation." In another case in which an alleged right of way was challenged because it was not properly described, the Court said:

> ". . . if a right of way is entered upon and used, the way becomes definite and fixed even though it may have been indefinite in its description."
>
> *Isenberg* v. *Woitchek,* 144 Colo. 394, 356 P.2d 904 (1960).

And finally the Court in the *Snedeker* case stated, while quoting from 28 C.J.S. *Easements,* Section 806:

> "Where a way is granted without fixing its location, but there is a way already located at the time of the grant, such way will be held to be the location of the way granted unless a contrary intention appears." 257 Minn. at 222, 101 N.W.2d at 222.

The plaintiff-appellees contend, therefore, the manner and extent to which the defendant operated its airport prior to the time when the Court actually granted the easement, firmly fixes such easement and no claim of ambiguity can be heard to attack its definiteness. The easement was granted to permit the airport to continue its operations in the same manner as it was being operated at the time of the suit. If the City wants to find out exactly what the Court's intention was in granting the easement, all it has to do is check the airport's operation.

The City finally contends that an avigation easement "applies to all airplanes, not just a few." However, easements similar to the type granted by the District Court which restrict the use of the easement to specific types of planes are not uncommon. The Court of Claims in the case of *A. J. Hodges Industries, Inc.* v. *United States*, 355 F.2d 592, 594 (Ct. Cl. 1966) authorized:

> ". . . The defendant to utilize the easement for the operation of B-52 jet bombers and other aircraft causing similar or less interference with the use and enjoyment of the subjacent property."
>
> See *Avery* v. *United States*, 330 F.2d 640 (Ct. Cl. 1964).

Such limited authorization reflects another principle of law which holds that even though an avigation easement has already been granted, if, through the introduction of larger, heavier aircraft, the defendant further seriously interferes with the use and enjoyment of the previously affected property, the defendant will then be charged with taking an additional easement for which compensation will be required.

> *A. J. Hodges Industries, Inc.* v. *United States,* 355 F.2d 592 (Ct. Cl. 1966);
>
> *Avery* v. *United States,* 330 F.2d 640 (Ct. Cl. 1964).

The Court's attention is directed to the statement in *United States* v. *Causby,* 328 U.S. 256, 267 (1946) which provided the basis for the U.S. Supreme Court's remand:

> "The Court of Claims held, . . . that an easement was taken . . . It is not described in terms of frequency of flights, permissible altitude, or type of airplane."

This statement clearly implies the United States Supreme Court's requirement that the easement not only be described but that it be described with precision, even as to the number of flights and the types of planes which are to be allowed under the avigation easement. Accordingly, it must be concluded that the Court recognized that the easement not only can be but must be limited to a definite "frequency of flight" and "type of plane." Thus the City's contention that the easement must be made available to all planes is contra to settled law. By the limited easement, the City is put on notice that if it abuses and violates the Court-granted easement by flying additional or different type planes it will be held liable for an additional "taking" for which it would be required to further compensate the plaintiff-appellees.

The present easements therefore must be considered valid and there is no substance to the contention that the District Court's judgment failed to establish the rights and liabilities of all parties involved.

VI.

THE HOLDING OF THE SUPPLEMENTAL HEARING ON DAMAGES WAS NEITHER UNAUTHORIZED NOR AN ABUSE OF JUDICIAL DISCRETION.

The defendant City claims that the trial court had no authority to order a supplemental hearing on the issue of damages and that even if such authority existed the exercise of it was an abuse of discretion. Neither contention has any merit.

The period has long passed when the trial of a cause of action was considered as a purely adversary proceeding with the victory belonging to the strongest advocate regardless of the inherent issues of justice involved. Courts now are the seekers of truth and the dispensers of justice and are endowed with inherent powers to achieve those ends. Judge McLean recognized and pursued this. Having found that the facts supported a "taking" of the plaintiffs' property, he turned to the issue of damages and stated "There has been a failure of proof on this subject and I could dismiss the plaintiffs' claims for compensation on that ground. *To do so seems to me unjust.* Accordingly, I will hold a further hearing, limited strictly to this question of amount of compensation . . ." (Op. p. 34) (Italics ours).

This power has been exercised by many courts and has even been extended by Rule 59 of the Federal Rules of Civil Procedure to permit additional evidence even after judgment has been entered. Rule 59(a) allows the court to "open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment". Rule 59(d), titled "On Initiative of Court", further broadens the trial court's powers by stating:

> "Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for which it might have granted a new trial on motion of a party."

Thus under Rule 59 the trial judge, in his own discretion and on his own initiative, has authority to grant a new trial within ten days after the entry of judgment. In the present case the trial judge merely ordered additional evidence on the issue of damages before his final judgment was entered.

That the foregoing rules merely reiterate common law doctrines is evidenced by *Charles* v. *Norfolk & Western Ry. Co.*, 188 F.2d 691 (7th Cir. 1951) *cert. denied*, 342 U.S. 831 (1951) where the court said that Rule 59 recognizes the old common law principles that if a trial judge is not satisfied with a verdict, it is his duty to set it aside and grant a new trial. It is commonplace for courts to grant new trials on the issue of damages alone. In *Wagner* v. *Burlington Industries, Inc.*, 47 F.R.D. 146 (E.D. Tenn. 1969) when the court stated that such power to grant a new trial on the issue of damages is clear, it was merely following precedent established in many other cases. Again, Rule 59(a) recognizes the proposition that a "new trial may be granted . . . on all or part of the issues." This is supported by the case of *Consentino* v. *Royal Netherlands Steamship Company*, 389 F.2d 726, 727 (2d Cir. 1968) *cert. denied*, 393 U.S. 977 (1968), in which the Second Circuit, in a Per Curiam decision, stated:

> "Whether a verdict is excessive and whether a new trial should be granted pursuant to a motion under Rule 59 of the Federal Rules of Civil Procedure are questions addressed to the discretion of the trial judge."

The Respondents contend that the authority of the trial court to hold a supplemental hearing on the sole issue of damages is indisputable.

The City next alleges that even if such authority exists the trial judge abused this discretion in ordering a supplemental hearing when he found no damages had been demonstrated at the original trial.

As indicated above, while the trial judge stated that there was a failure of proof on the subject of damages, he further stated that to "dismiss plaintiffs' claim for compensation on that ground" would be unjust. (Op. p. 34) It is plaintiffs' claim that failure to find a proven amount of damages is quite different from failure to find any proof of damage at all, and that as a matter of record, the Court did find that damages had been proven when it said: "It is reasonable to believe that these properties could be sold for still more if they were not subject to these overflights". The Court then went on to say: "but the evidence does not permit a determination as to how much more the price would be." (Op. p. 34) Basically, what the court did was to find that there was a "taking" and that the plaintiffs had been damaged. It then, after determining the plaintiffs' requested damages as being too high and the City's claim of no damages as untrue, gave to all parties the opportunity to present further evidence to support their respective positions.

The defendant City failed for a second time to support its position. It presented basically the same evidence as it had at the first hearing and the court stated as to the City's claim that none of the plaintiffs had been damaged: "This conclusion defies common sense and I decline to accept it. I have no doubt that the plaintiffs have been damaged." (App. p. 2a)

Having found that the plaintiffs were in fact damaged, it was no abuse of discretion to order further evidence as to the exact amount of such damage. It was a proper exercise of discretion and may well have saved this court the necessity of remanding the case for a more proper determination of the amount of damages, such as was done in *Decato* v. *Travelers Insurance Company*, 379 F.2d 796 (1st Cir. 1967) and *Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965).

It should be noted that on December 11, 1970, almost two months after the trial, the defendant City joined with the airlines in a motion to have Judge McLean reopen the trial to permit further testimony. The petitioners' concern at that time was the effect of the Connecticut state court decision on jet flights. (Footnote, Op. pp. 18, 19) Evidently, the defendant City did not find anything improper about such a procedure when it was the petitioner who sought relief.

Respectfully submitted,
By ANTHONY V. DEMAYO, Esq.
Attorney for Respondents.

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MICHAEL RODAK, JR.

In the

Supreme Court of the United States

JANUARY TERM, 1973

No.

THE CITY OF NEW HAVEN,
Petitioners,
v.
THE TOWN OF EAST HAVEN, ET ALS.,
Respondents.

APPENDIX TO RESPONDENTS' REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUPPLEMENTARY OPINION

MCLEAN, D.J.*

In my decision dated July 30, 1971, I stated that unless the parties stipulated to the amount of compensation to be paid by defendant City of New Haven to certain individual plaintiffs for the easement in their properties which I found to have been taken, I would hold a further hearing at which both sides might offer testimony on that subject. No stipulation was forthcoming and accordingly, a further hearing was held on

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*Of the Southern District of New York, sitting by designation.

October 18, 1971. Plaintiffs called two real estate appraisers and defendant City of New Haven called one, the same expert who had testified for the City at the trial.

Defendant's expert did not testify to a sufficient number of sales of comparable properties to afford any basis for determining the diminution of market value of the properties in question. Instead, he adhered to the opinion which he had previously expressed at the trial, *i.e.*, that none of the plaintiffs has been damaged because the noise, soot and vibrations emanating from the planes approaching and taking off from the airport have had no adverse effect whatever on the market value of plaintiffs' properties. This conclusion defies common sense and I decline to accept it. I have no doubt that plaintiffs have been damaged. The question is whether plaintiffs have succeeded in proving the amount of that damage with reasonable certainty.

Plaintiffs' experts testified to their opinion as to the market value of the respective properties before the taking and the market value of those properties after the taking, the difference being the damage.* Their opinion as to the market value before the taking was based on data as to sales of comparable properties, except in two instances, in which, there being no comparable sales, the opinion was based on reproduction cost less depreciation. Except for one property, plaintiff Munro's residence at 110 Morgan Avenue, defendant does not challenge the accuracy of plaintiffs' figures for the market value before the taking. Defendant's attack on the valuation of 110 Morgan Avenue does not affect the result significantly. The controversy thus relates primarily to plaintiffs' experts opinion as to the market value of the respective properties after the taking.

---

* The business property at 52 South End Road, formerly owned by plaintiff Jones, was sold by him on January 2, 1969. Plaintiffs' experts' appraisal for that property speaks as of that date. Their appraisals for all the other properties purport to speak as of September 15, 1971, almost a year after the trial. They testified, however, that their opinion would be the same as of October 1970, the time of the trial. I will treat it as referring to the earlier date.

Plaintiffs' experts testified, in substance, that it was not feasible to determine this value by comparing sales of properties in the vicinity of the airport with sales of similar properties in other neighborhoods because the sales data was inconclusive. The variations in price were too great to permit the drawing of any sound conclusions. They therefore based their opinion primarily upon a formula which has been developed by one Thomas Hall and explained by him in articles in real estate appraisers' trade journals. It is designed to determine the amount of the diminution in the market value of properperties adjacent to airports due to airport operations. The formula takes into account three factors: (1) the height of the planes over the subject property up to a maximum of 500 feet; (2) the distance of the property from the extended center line of the runway up to a maximum of 2,000 feet; (3) its distance from the end of the runway up to a maximum of 25,000 feet. Hall ascribed different weights to these factors, giving the greatest weight to the first, the height of the passing planes. Plaintiffs' experts agreed with this weighting in general, but varied somewhat the weight which Hall ascribed to the second and third factors in order to make the formula, in their opinion, more appropriate for this particular airport. Application of this formula yielded a percentage by which the market value of the property before taking should be reduced in order to arrive at its market value after taking. Since this is done by means of a percentage, it is apparent that in two cases in which the percentages are approximately the same, the dollar amount of the reduction will be larger in the case of a property having a high market value before taking than it will in the case of a property having a low prior market value.

We are dealing here with expert opinion. No opinion is necessarily conclusive. Use of this formula in an airport case, in the absence of any other pertinent data, seems to me to afford a reasonable basis for the experts' opinion. Since I have been given no further pertinent data here, I have decided to apply the formula which, incidentally, produces a result substantially lower than the opinion expressed by plaintiffs' expert at the trial, which I declined to accept. Under all the circumstances, I would not feel justified in rejecting plaintiffs' evidence in its entirety, as defendant suggests.

The service station formerly owned by plaintiff Jones at 52 South End Road, however, is a special case. As to that property, the decision of July 30, 1971 stated (p. 55 n.) that an easement could be granted if Jones could prove "that, because of the overflights, he received less for the property which he sold than he would otherwise have received." Jones has not come forward with that proof. On the contrary, plaintiffs' experts expressed the opinion that the fair market value of the Jones property before the taking was $25,000. This is exactly the figure that Jones sold it for on January 2, 1969. Hence it affirmatively appears that Jones has not been damaged.

Defendant argues that because Jones sold his property in January 1969 for the sum which plaintiffs' experts consider to

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have been its fair market value before the taking, therefore the other plaintiffs also could sell their properties for their market value before the taking and hence they have not been damaged either. This does not necessarily follow. Moreover, it may be noted that in January 1969, when Jones sold his service station, neither Eastern nor Allegheny was operating jets, only turbo props. See decision of July 30, 1971, pp. 11-12.

On the basis of all the evidence, I find that the fair market value of the properties of the following plaintiffs has been reduced in the following amounts by the taking:

Michael Fusco 25 Holmes Street	$2,500
Leslie Munro 110 Morgan Avenue	2,850
Leslie Munro 114 Morgan Avenue	2,100
Michael Criscuolo 72 Morgan Avenue	3,200
Alphonse Guidone, Jr. 6 Canna Drive	2,250
Louis Audette 10 Silver Sands Road	2,200
Leon Amendola[*] 2 Meadow Place	3,300

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[*] The percentage of diminution is less in Amendola's case than any of the seven plaintiffs, 6.3 per cent as opposed to percentages in other cases running as high as 9.5 per cent. As it happens, however, Amendola's house is more elaborate than any of the others and had a substantially higher market value prior to the taking, hence his damages turn out to be slightly more than those of the other plaintiffs.

These plaintiffs are entitled to judgment against defendant City of New Haven in the foregoing amounts. If any of the parcels is in the joint names of a plaintiff and his wife, the judgment should be in favor of both. I permitted the wives to be joined as plaintiffs for that purpose. See decision of July 30, 1971, pp. 4, 5.

Upon payment of the judgments, defendant City of New Haven will acquire a permanent easement in the properties of these plaintiffs for the operation of a similar number of turbo prop planes and jet planes of the size in use at the time of the trial. See decision of July 30, 1971, p. 56.

Defendant City of New Haven is entitled to judgment dismissing the claim of plaintiff Jones on the merits.

Although judgment has been entered since July 30, 1971 in favor of Eastern Airlines and Allegheny Air Lines, no judgment has as yet been entered with respect to the claims of the various plaintiffs against defendant City of New Haven. As stated at the conclusion of the decision of July 30, 1971, p. 63, defendant City of New Haven is entitled to judgment dismissing all claims except the claims for compensation allowed in this supplementary opinion.

Pursuant to Rule 52(a), this opinion constitutes the court's findings of fact and conclusions of law.

Judgment may be entered accordingly.

So ordered.

Dated: November 1, 1971

EDWARD C. MCLEAN
U.S.D.J.

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OPINION OF DISTRICT COURT JUDGE WILLIAM H. TIMBERS ON CITY OF NEW HAVEN'S MOTION TO DISMISS

Plaintiff's complaint alleges a taking of their property without compensation by the City of New Haven under color of state law. Such an allegation is sufficient to raise a substantial federal question under the due process clause of the Fourteenth Amendment. *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962); *Mosher* v. *City of Phoenix*, 287 U.S. 29 (1932); *South Covington & C St. Ry.* v. *City of Newport*, 259 U.S. 97 (1922); *Lowe* v. *Manhattan Beach City School District*, 222 F.2d 258 (9 Cir. 1955). *Cf. Mosher* v. *City of Boulder*, 225 F. Supp. 32 (D. Colo. 1964). Since plaintiffs also allege the requisite jurisdictional amount, this Court has jurisdiction pursuant to 28 U.S.C. 1331 (1964).

The City of New Haven, however, claims that this Court lacks jurisdiction because, if the plaintiffs' property has been taken, such a taking is also a violation of Connecticut's constitution and laws, and plaintiffs must, therefore, first seek redress in a state court. This very contention was rejected by the Supreme Court in *Mosher* v. *City of Phoenix, supra*. The plaintiff in that case sought to restrain the City of Phoenix, Arizona, from appropriating her land for purposes of a street improvement project. She alleged in her complaint filed with the District Court for the District Court of Arizona that the city was "attempting to take and appropriate the property of plaintiff without compensation, and to take and appropriate and use same and deprive the said plaintiff of the permanent use thereof without due process of law, or any process of law, . . . and in violation of the rights of plaintiff as guaranteed her under the Constitution of the United States, and particularly under amendments five and fourteen thereof, which plaintiff here and now pleads and relies on for her protection against the wrongs and threatened wrongs of the defendant city in the proposed taking of her property as hereinbefore described." *Id.* at 31. But because the plaintiff also alleged that the city's action violated state law, the Court of Appeals for the Ninth Circuit affirmed dismissal of the complaint by the District Court for lack of a substantial federal question, noting that the city's action did in fact appear to violate state law. *Mosher* v. *City of Phoenix*, 54 F.2d 777 (9 Cir. 1931). The Supreme Court, however, held that the dismissal was improper:

> "We are of the opinion that the allegations of the bill of complaint that the City acting under color of state authority was violating the asserted private right secured by the Federal Constitution, presented a substantial federal question and that it was error of the District Court to refuse jurisdiction." 287 U.S. at 32.

This case is controlling here. *Barney* v. *New York*, 193 U.S. 430 (1904), cited by the City of New Haven for the contrary position, was decided by the Supreme Court prior to the *Mosher* case. As Mr. Justice Brennan, writing for the Court in *United States* v. *Raines*, 362 U.S. 17, 25-26 (1960), stated:

> "The appellees can draw no support from the expressions in *Barney* v. *City of New York* . . . The authority of those expressions has been 'so restricted by our later decisions', see *Snowden* v. *Hughs* (321 U.S. 1, 13 (1943), that *Barney* must be regarded as having been worn away by the erosion of time, *Tigner* v. *Texas*, 310 U.S. 141, 147, and of contrary authority. See *Raymond* v. *Chicago Union Traction Co.*, 207 U.S. 20, 37; *Home Tel. & Tel. Co.*

> v. *Los Angeles*, 227 U.S. 278, 283-289; *Iowa-Des Moines Nat. Bank* v. *Bennett*, 284 U.S. 239, 247; *Snowden* v. *Hughes, supra; Screws* v *United States*, 325 U.S. 91, 107-113, 116. *Cf. United States* v. *Classic*, 313 U.S. 299, 326. It was said of *Barney's* Doctrine in *Home Tel. & Tel. Co.* v. *Los Angeles, supra*, at 284, by Justice White: '(its) enforcement . . . would . . . render impossible the performance of the duty with which the Federal courts are charged under the Constitution'."

The Court adheres to the Supreme Court's admonition in *Martin* v. *Creasy*, 360 U.S. 219, 224 (1959), that a federal court should "stay its hand" in order to avoid "unseemly conflict between two sovereignties, the unnecessary impairment of state functions, and the premature determination of constitutional questions." But unlike *Martin*, the circumstances which would merit abstention are not present in the instant action. The constitutional question is not a novel one, having been decided in *Griggs* v. *Allegheny County, supra*, and the activities from which the plaintiffs seek relief have already occurred. Furthermore, a state statute is not under attack and the state courts have not, as they did in *Martin*, signified in a related action that relief will be granted.

The Court, therefore, finds that plaintiffs state a good cause of action against the City of New Haven over which this Court has, and should exercise, jurisdiction.

The City of New Haven also claims that the plaintiffs' complaint must fail because the United States, the C.A.B. and all users and operators of aircraft at the airport are indispensable parties and have not been joined as defendants. *Griggs* v. *Allegheny County, supra*, clearly refutes this claim.

A further challenge is made to the maintenance of this suit as a class action and to the standing of certain of the plaintiffs. In view of the fact that the Court has subject matter jurisdiction and the standing of the majority of the plaintiffs is unchallenged, the Court will defer a determination of these issues until a more appropriate point in the proceedings. Similarly, the Court will defer ruling on the issue of whether the City of New Haven is entitled to a further specification of damages, although the Court does find at this time, under the present posture of the action, the complaint alleges damages with sufficient specificity to sustain a cause of action.

The motion to dismiss by the City of New Haven is denied.

ORDER

Ordered, as follows:

(1) That the motion to dismiss as against the defendant Administrator of the Federal Aviation Agency is granted, but without costs; and the Clerk is directed to enter judgment accordingly.

(2) That the motion to dismiss as against the defendants Eastern and Allegheny is denied.

(3) That the motion to dismiss as against the defendant City of New Haven is denied.

Dated at New Haven, Connecticut, this 31st day of January, 1968.

/s/ William H. Timbers
Chief Judge

TESTIMONY OF DONALD J. NITZ

DONALD J. NITZ, called as a witness by the Plaintiffs, being first duly cautioned and sworn by the Clerk, was examined, and testified on his oath as follows:

By the Clerk:

Q. What is your name? A. Donald J. Nitz.

Q. What town do you live in? A. Northford, Connecticut, 56 Coach Drive.

Q. Northford? A. Yes. It is part of North Branford.

Direct examination by Mr. DeMayo:

Q. Mr. Nitz, what is your occupation? A. Real estate appraiser.

Q. Your qualifications appear in each of the specific appraisal reports, do they not? A. Yes, they do.

Q. Would you briefly state your educational background? A. I am a graduate of the University of Connecticut. I have appraised real estate and real estate only since 1966. I hold the R.M. designation from the American Institute of Real Estate Appraisers. I have appeared as an expert witness in Connecticut courts.

Q. Have you testified in Connecticut extensively before boards and commissions and State agencies? A. I wouldn't say extensively, but I have testified, yes.

Q. Have you taken additional courses offered by the Institute of Real Estate Appraisers? A. Yes, I have taken three of the courses offered by the American Institute.

Q. Prior to the embarking upon the effort that resulted in the preparation of these appraisals, had you had any contact with or knowledge of the Tweed-New Haven Airport and the real estate surrounding the airport? A. Yes, I have. My former employer was situated in the City of New Haven, and during my employment with him, I performed a number of appraisals not only in the Town of East Haven but in the Morgan Point area, and in 1966 and 1967 I worked on the original acquisition appraisals for the extension of the runway to its present length.

Q. Upon embarking upon this study, did you return to the area and make field studies and examinations of the subject properties and the area in general? A. Yes, I did. I spent a great deal of time in the Town of East Haven, more time than I intended to. During this time, I investigated the real estate market as thoroughly as I felt anyone could possibly do. I spent a great deal of time in the immediate area, observing the situation as it existed. I talked to a great number of property owners in addition to the property owners of the subject properties as to their feelings and attitudes about the airport and the aircraft and the circumstances which existed right now and also which have existed in the past. I also discussed this matter with a number of people, friends, acquaintances, and people in general who then lived in the East Haven area as to their opinion or their thoughts about purchasing a home in the East Haven area, principally adjacent to or very close to the airport. I put together all of this data and drew my conclusions from it.

Q. Are they basically included in the various appraisal reports which his Honor has received in evidence? A. Yes, they are.

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Q. Just to elaborate a bit on one phase of this, were you active in compiling the market data which went into the preparation of the reports? A. Yes, I was.

Q. Would you describe for his Honor in a general way what was studied, what areas you covered, what data you accumulated, and how many samplings you took and where those samplings occurred? A. Yes. As far as the particular situation is concerned, I considered as my primary areas those areas which were directly at the termination points of each of the runways we are concerned with, and properties in a radius around the center point. On the south end of the airport in the Morgan Point area, because it is an area that is more or less isolated, it is practically a peninsula and has water surrounding it on three sides, I considered all of the properties in that area. When I went up to the northerly end of the same runway, which is a more populated area, I more or less confined myself to the approach zone and the areas surrounding that, and on the north of the — I don't know the numbers, but I think it is runway 18, I considered a number of properties in that area. I also analyzed real estate throughout the Town of East Haven.

Q. Did you also include in your study real estate or properties in the surrounding towns? A. Yes, I did.

Q. Do you have a rough estimate as to how many properties were examined other than the subject properties, how many transactions were involved? A. As I said, I made a complete study of all the transactions in the area I previously mentioned, and I was to some extent surprised to find the amount of inactivity in these areas, which is attributed to a number of circumstances. I would say my total number of sales was between 50 and 75. This encompassed an area of which I would estimate there were located possibly 2,000 or 3,000 dwelling units. Of the 50 to 75 sales, about 10 or 15 were of properties which had been zoned and rezoned within the last five-year period.

Q. This was the type of material which you considered and evaluated in preparing these appraisals and in working on this formula? A. Yes, it is. We evaluated the real estate transactions and the real estate market in general and applied it to our formula.

Q. In your professional opinion, do you feel that this formula approach was the preferred, more accurate approach to your problem? A. Yes, I do, the reason being that all of the data I compiled, I felt that the results were inconclusive, the range of variations was great. For instance, properties which had been sold and resold within the last five years within the subject areas, some of them showed evidence of no appreciation; some of them showed evidence of a great deal of appreciation. There was no pattern. I didn't feel there was a sufficient amount of data with this wide variation to establish any conclusions as to effect on the market by an analysis of sales and resales.

Q. Finally, based upon your experience in the field as an appraiser and based upon your activities in this area and your examination and in view of all this, it is your professional opinion that the values stated in the revised Schedule A are consistent with what you personally feel these properties have been damaged?

Mr. Frechette. I would object to that on the ground — if I quoted him correctly — his other results were inconclusive.

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The Court. I know, but I will let him testify.

A. I will have to ask for the question again. I am not quite sure I understand the question.

The Court. Please read the question.

(Whereupon, the question referred to was read by the Court Reporter.)

A. Yes, I do.

Mr. DeMayo. I have nothing further.

Cross-examination by Mr. Frechette:

Q. Mr. Nitz, when did you finish working for William Ball? A. March of 1971.

Q. For what period of time had you worked for him? A. Since January 4th of 1966.

Q. Would it be that fact that in Mr. Ball's office he keeps track of all sales in the New Haven area? A. At the present time or —

Q. When you were there. A. I wouldn't — yes.

Q. Does he keep a card file on every sale in the New Haven area? A. It depends on what you call the New Haven area.

Q. From Milford to Guilford to Cheshire? A. No.

Q. Do you keep such a file? A. Not every sale, no.

Q. What does the twenty to one ratio for the Amendola property do to the formula that you have told us about? A. It doesn't do anything to it. You modify it to put the applicable figures in it.

Q. In other words, it is the same as fifty to one? A. No. It creates a steeper angle.

Q. So it would lessen the damage to the Amendola property? A. If applied in the formula, it would depend on other circumstances. If that was the sole change, then it would. If that was the sole consideration, then it would.

Q. Fair enough. Isn't that in the Macon study, that study took into consideration a military base and predominantly retail properties were involved? A. There were some resale properties, but there were also fee-owned properties.

Q. Most of the people in this area were military personnel, were they not? A. I don't believe so.

Q. Are you saying no? A. I am saying I don't believe so. I am not sure.

Q. Do you know? A. I don't know positively.

Q. You know there is a military base there, don't you? A. That's right.

Q. It is the only thing around there? A. I don't know that.

Mr. DeMayo. I object to his arguing with the witness. He has answered the question.

By Mr. Frechette:

Q. Your answer was what? A. I don't know if there were any military people around.

Mr. Frechette. I have nothing further, your Honor.

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By the Court:

Q. I don't understand this twenty to one angle for the Amendola property. Can you explain this? A. Yes, your Honor. Perhaps I can show you on a copy of the chart you have in evidence.

Redirect examination by Mr. DeMayo:

Q. This is a copy of one of our other exhibits? A. It is a 50 percent reduction. The Amendola property in relation to the runway which is here would be located somewhere around here. This is a profile of the 5,600-foot runway. This is a profile of the shorter runway, which is the one we are talking about. At the end of this runway as shown in this exhibit, a twenty to one glide angle slope is used, whereas on the 5,600-foot runway where most of the subject properties are located, there is a fifty to one glide angle slope as shown on this diagram (indicating).

The Court. I don't know what this paper is he was showing me. Is this a copy of an exhibit in evidence?

Mr. DeMayo. Yes, your Honor. We don't have it available. It is in the Clerk's office, but that is a copy of that exhibit.

The Witness. I think you have it right there. This is a reduction. This is why it isn't the same size.

By the Court:

Q. You are referring to the map which was marked at the trial as Eastern Airlines Exhibit A-7? A. Yes, sir, and this is where I was pointing, a twenty to one glide angle, which is this for this runway because it is utilized by a different type of aircraft.

By Mr. DeMayo:

Q. That was the only property that didn't involve the north-south runway, if you will recall? That is really the eastern end of the east-west runway? A. This was the basis for our utilization of the fifty to one glide slope, your Honor, as shown on this diagram.

Mr. DeMayo. Your Honor will recall that the VASI devices only covered the southern approaches to the north-south runway.

I have nothing else, your Honor.

Mr. Frechette. I have nothing further of this witness.

(Witness excused.)

Mr. DeMayo. The Plaintiffs rest your Honor.

Mr. Frechette. I am going to put Mr. Parente on, if it please the Court.

EXCERPTS OF TESTIMONY OF LESLIE MUNRO

A. Well, the planes start coming in over Gull Rock. That is south of my house.

Q. South out here somewhere? A. That's right.

Mr. DeMayo. I am indicating an area, your Honor, off to the left of the map on the blackboard not shown.

The Witness. It does not come directly over my house. It is on an angle, or — let's see. I am here, and it is up in the

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air here coming over like this. On the way out, when the plane is going out, it goes practically over our house.

Q. You mean when they take off? A. When they take off.

Q. From north to south? A. North to south.

Q. They go over your house? A. Right.

Q. Even when they land? A. They come from Gull Rock.

Q. So that they are lined up closer to the runway when they come in? A. Well, they are 150, 200 feet down the street a little ways.

Q. But, your testimony is that —.

The Court. Let him testify. Ask him another question.

Q. Now, you live slightly off the center of the extended line of the north-south runway, is that correct? A. That's right.

Q. And is it your testimony that they go out in a straight line? I mean, they go out and go over your house, but when they come in they are not over your house? A. They seem to spot Gull Rock with their lights at night.

Q. Maybe you can step down here and take the pointer and follow them in so I am not coaching you. With your pointer, start at the end of the map and point out to his Honor the course that they take coming in.

The Court. First, Mr. Munro, would you tell me the approximate distance from your house to the south end of the 2-20 runway?

The Witness. It's almost, I would say, three-quarters of a mile from my house to that point there.

The Court. All right. Now, where is that Gull Rock that you talked about,

The Witness. This Gull Rock is out in about here. The breakwater is over here on this side here, and Gull Rock is right here.

Q. All right. Describe the route. A. As it comes in, I would say it goes like this. They bank left to get into the field.

Q. And at that point you claim they are over your house? A. On the way out they are practically over my house, but on the way in they are just to the east of where I am.

Q. You can resume your seat, I think.

How have these flights interfered with your enjoyment of your property? A. Well, the first thing in the morning, they are not exactly on time. They wake you up. You hear a little buzz, and all of a sudden they are right on top of you, and you jump out of bed and just hope it isn't foggy. We are a fog laden airport. You see the airplane coming in, and sometimes their wings are going like this when he is coming in, and you just hope that he is not going to come down and hit you, because I know the result.

Q. All right. What else do you — describe what else you are suffering from with these flights? A. Well, because I am on that angle, the airplane is up in the air like that on account of my house, on an angle, and I was forced to put plexiglass in my windows.

Q. Why was that necessary, Mr. Munro? A. I had over about $200 worth of windows broken in my house due to the flights, and I had to use that, sir.

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Q. You mean you replaced all — A. Everything that breaks, I put in new plexiglass now.

Q. I don't think we need offer that. I think your testimony is sufficient, unless Mr. Murphy or Mr. Beckman wants to question you further. But, do you mean that the planes themselves have broken the glass? A. The vibrations. My house is built on solid rock. I have steel windows, and never thinking that there would be airplanes which would vibrate the windows as much as they do, which in turn breaks the glass. And, it's not the expense of changing them around, but it's the mess. When they come down, we have to dig that glass out. The glass is all over the place, and they have no respect for glass on the bare feet where we can walk out in the summertime.

The Court. Your house is on the beach?

The Witness. Right on the water.

Q. You say windows are broken. Would you observe this immediately after a plane passing? A. We lay in bed, my wife and myself, and we hear a snap, and it starts off with a little crack, and before the end of the day it is right up there, right up the window. Besides that, it is not where the clip goes on the window; it is anywhere on the window. I have eight of them right now to prove it if anybody wants to look at them.

Q. Did you notify the Tweed-New Haven airport of this? A. I believe we called about the airplanes, but we never complained to them about that.

Q. In addition to the breakage of glass, and the sounds that you experience, what other annoyance do you have? What else have you observed about the flights? A. Well, of course when they are coming in, they head over Gull Rock. If the day is a little foggy, it is unbelievable the soot that comes out of it. My wife is continually wiping it up. Every single day she pulls the dirt off the molding on the baseboard. It seeps through the house. If you open the window after you have not used them for a while, in the curve of the fenestra sashes is all that black soot.

Q. Have you actually observed these planes in flight in an attempt to ascertain where this material comes from? A. Where this what?

Q. Where this soot comes from. Have you actually followed the planes in flight? A. Oh, yes. Of course, the jets — all of them do it a little, but the jets are the worse.

Q. Do you have any other circumstances to describe which you claim are the results of operations at Tweed-New Haven airport? A. I can't think of anything right now.

Q. Well, do you, for example, feel that the jet operations or the plane operations have interfered in any way with the use of the exterior of your house? A. With the exterior?

Q. With the outside of your house. A. Of course we do get the dust on the windows, as I said. It gets right in the grooves. Actually, I have a shadow block house which is plasticrete blocks with thoroseal on it, and it's rough and, of course, naturally it gets all dark, and I have to paint it that much more.

The Court. How high would you say these planes are when they either go over your house or go near your house?

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The Witness. Well, as I say, I am laying in bed here, and there are three bars in my window, and when I am laying down flat in my bed, and I just looking out like that, well, I would say probably the plane is five or six hundred feet out.

The Court. Do you mean above your house?

The Witness. No. On the line with these bars, on the second bar of the house, and I can see it on an angle just up there. Well, as I say it's 200 feet away, 300 feet away from my house, and it is coming in, and I look up here like this. If they get below that line, then I know they are darn close. Now, I mean, when you are in a fixed position laying back here, and you can see it on an angle like that, you know darn well they are close.

The Court. Well, my question was approximately how high above your house, or how high in the air alongside of your house would you say these planes fly?

The Witness. They probably will be flying 200 feet. They are all different levels, of course. Sometimes they are a little low.

The Court. Now, are they sometimes lower than 200 feet?

The Witness. I would say yes.

The Court. Are they sometimes higher than 200 feet?

The Witness. Yes.

The Court. Do you hear any noise from these planes?

The Witness. Oh, it's terrific. The noise is just terrific. You just can't answer a telephone. You've got to stop all conversations.

Q. Is it the noise that sets up the vibration that you complain of in connection with your windows? Is that what you meant by vibration? A. I was up in the attic. Of course, there are no windows in my attic on the south side, just on either end. I went up to see how close that plane was coming in, and I put my head up to the glass, and it went s-s-s-s-s-s-t.

Q. If you were to look directly out parallel to — straight out your window, look out on a level with the window pane at a plane going by, how far above your house would they usually appear to be? That is what I think his Honor wants to get at. A. Of course, I can't tell you how far the plane is, but I would say you can tell the difference in the sound which is much closer.

Q. And your best estimate then is 200 feet? A. Well, I would say roughly.

Q. You also indicated that sometimes they are higher, and sometimes they are lower? A. That's right. It depends on the pilot that is coming in.

Q. In your opinion, have the increased operations at the airport made your residence less desirable for you to live in than back in the days when you only had the smaller planes to

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EXCERPTS OF TESTIMONY OF MICHAEL FUSCO

MICHAEL FUSCO, of 25 Holmes Street, New Haven, Connecticut, having been called as a witness, was duly sworn and testified on his oath as follows:

Direct examination by Mr. DeMayo:

Q. Mr. Fusco, your property is located beyond the northern end of the north-south runway, is that correct? A. Yes.

Mr. DEMAYO. I believe counsel are in agreement then that this would be Mr. Fusco's property right here.

Q. And then you are across Dodge Avenue? A. Definitely. Yes, sir.

Q. Is your entire property located in the City of New Haven, Mr. Fusco? A. No. It's not.

Q. A portion of it is in both towns? A. Yes, sir.

Q. Has the City of New Haven ever offered to purchase your property? A. No, sir.

Q. Could you tell me approximately, if you know, how far you are in feet from the airport boundary at Dodge Avenue? A. I'd say about 900 feet.

Q. 900 feet? A. Yes.

Q. And your property, as the map would indicate, is in the direct glide path to the north-south runway, is that correct? A. Yes.

Q. Does that mean that the planes using that runway all come over your house? A. Yes.

Q. Both on take-off and on departure? A. No. Well, it depends which way the wind blows.

Q. I see. If they were taking off south to north, do they go over your property? A. South — from south to north they come over my house, yes.

Q. And if they are taking off north to south, they —. A. They warm up on my side.

The Court. They warm up what?

The Witness. On my side. They warm up. The planes are idling; they sit by Dodge Avenue and they idle, they warm up.

Q. Now, that point where they would be idling then, preparing to take off from north to south, that would be in front of your house? A. Well, in the back of the house, yes.

Q. Your back of your house faces that direction? A. Yes.

Q. Can you hear them when they are on the runway? A. Yes, sir.

Q. And would you describe to us what you hear? A. Well, sometimes they are on there for at least half an hour, and they just idle, just making noise, you know. They are idling, warming up, maybe waiting for clearance, I don't know. But they are still there annoying us, and then the smells come. If they are near any period of time, the smells start coming, and we shut the windows. It gets bad.

Q. Now, does the noise have any affect on conversation in your house? A. Well, only on take-offs it does, but if they are idling there, they are far enough away so that we could still talk.

Q. You could still talk? A. Unless they take off.

Q. It is when they take off that your conversation is impeded? A. Yes, sir.

Q. And while they are idling and you can hear the noise, is this a loud noise? A. It is a whistling type noise, you know. It is not actually a motor. Well, it is a motor, but I don't know what you are talking about now, a turbo-prop or a jet.

Q. Any plane. A. Yes. On a plane idling their motor, there is a whistling noise.

Q. But it is not — it is greater when they take off than when they are idling? A. Definitely, yes.

Q. The takeoff noise interferes with conversation? A. Yes.

Q. What if anything do you suffer from the idling noises? A. Well, when the noises — usually what it actually does is make the smell come from, you know, from south to north, which is my side. See, the smell eventually gets as far as us, you know.

Q. In other words, the major annoyance and inconvenience you suffer from the idling is the fumes? A. Yes.

Q. Rather than the noise? A. That's right.

Q. But referring to the noise itself, what affect does that have? A. Then what happens then is the fumes and the soot and everything come back to my house, and there are oil spots that are on my house, on the back side of my house.

Q. You have actually found oil spots? A. Oh, definitely. There is no question about it.

Q. And have you actually watched these planes performing this function so that you can follow this? A. Definitely. You could see it from my back window.

Q. From your back window? A. Yes.

Q. Right to the airport? A. Definitely.

Q. And you say that there are times when they idle on the runway for half an hour? A. Yes.

Q. Taking planes which are taking off from the south end of the runway, which would be the farthest—. A. Farthest, yes.

Q. Would they follow a path over your property? A. Yes. Here's what actually they do. When they are taking off, they take off and once they are airborne then they bear left a little bit, you know.

Q. But is there a path approximately over your house? A. Yes. Definitely, yes.

Q. Now, how about planes that are landing on the north-south runway, and are landing north to south. Do they make their approach over your house? A. Over my house.

Q. Now, can you estimate how low they are when they pass your property? A. Well, I'll put it this way. I read one time —.

The Court. Speak slowly.

Mr. DeMayo. Slow down.

The Witness. I read one time where the poles are about 50 feet, these poles that look like telephone poles with lights on them, and I'd estimate another five feet, so it's 55 feet. They come right over the poles with the lights on them.

Q. When you say poles, are these poles located in close proximity to your property? A. Yes. They are right about ten feet from my property.

Q. And these are poles with red lights on them? A. Yes, sir.

Q. Were these erected for the benefit of the airport?

Mr. WINER. Objection, your Honor. I think that is leading. We don't know whether he knows it or not.

The COURT. Do you know that?

The WITNESS. Well, I assume so, your Honor.

Mr. DEMAYO. You don't know who erected them?

The WITNESS. Well, I'll tell you we didn't.

Q. You didn't put them up? A. No, sir.

Q. You didn't put the red lights up? A. No, sir.

Q. But there is a row of poles facing the runway with red lights? A. Yes, sir.

Q. And you estimate their height to be 50 feet? A. 50 feet, yes, sir.

Q. And these are 10 feet from your property? A. Ten feet from my property, yes.

Q. And when these planes pass over this row of poles with the red lights, how high off the ground would you say they were? A. Fifty-five feet.

Q. Fifty-five feet off the ground? A. Yes.

The Court. So they miss the poles by five feet?

The Witness. I would say so, your Honor.

Q. At least they come very close to the poles? A. Definitely.

Q. Now, when they are proceeding in this fashion — let's first direct your attention to night arrivals, or after dark arrivals. Would you describe what happens on your property as a plane approaches to land at the north end of the north-south runway? A. Usually watching T.V. at night, we get a big flicker in the T.V. for one thing, and it does make enough noise at times that it wakes my children up when they are sleeping. My youngest is six, so it could wake her up. I am not saying it happens often, but it does happen. They are light sleepers, you know.

Q. What else? A. Our conversations — we have to stop conversations. We can't talk.

Q. Do you observe any odor at this time? A. Well, no. Not really. Not when they just come over, because when they are coming over they just, you know, they cut their power down. It is only when they are — in other words, when they are full power I get all the soot and everything, but not at quarter speed or whatever you want to call it.

Q. Now, are there any other activities of these planes approaching in this direction that annoy you? A. Well, both planes make noise.

EXCERPTS OF TESTIMONY OF ALPHONSE GUIDONE

* * * flights that you are relating to us in February or March of 1967? A. I didn't get that.

Q. What did you first observe? A. What did I first observe?

Q. Yes. A. Well, the turbo-prop, and naturally the larger planes were coming in, and it got quite noisy, and I started to see the fumes, and vibrations, and annoyances.

Q. Now, do these planes pass directly over your house? A. That's correct. The approach to the north-side runway is directly over my house.

Q. So they pass over your house in close proximity? A. There are times when they are directly, and other times where it is just in front of my house going over, and sometimes to the left, either left, or right, or over.

Q. And would you estimate, or do you have an estimate of the altitude of these planes as they pass over your property? A. I would estimate at times — it varies. I would say anywhere from 45 to 100 feet off the ground. I am basing my estimation on the height of our telephone poles outside our house which is 35 feet, as well as our trees, and from my estimation it would be anywhere from 45 to 100 feet.

Q. When these planes pass in that close proximity to your house, what occurs inside? A. Inside my house?

Q. Yes. A. Well, any time they fly over, you definitely get the noise, you get the fumes, you get the vibration, and the fumes.

Q. Now, you get this overflight when they are coming in to land from the south to the north, is that correct? A. And I get it when they take off, if they take off going over, because they take off and come in directly over my house.

Q. So you get the traffic in both directions? A. Take-off and landing, yes.

Q. Now, with respect to the hours these planes keep, could you tell us the hours of maximum inconvenience to you? A. Yes. Well, you get the morning flights. The present situation now on the jet service on the Eastern is that you get that Eastern plane — it is supposed to be coming in shortly after 7:00, but it could be anywhere from 7:00 to 9:00 o'clock in the morning. Now, it depends on the weather conditions whether he is up there circling, waiting for a clearance to land, and while this is happening, naturally you have the constant going around and around. I have had many times experienced this during the day, because I conduct the majority of my business from • • •

• • • may be expanded with the possibility of jet operations, and it is from that time on that I started, sir.

Q. Isn't it true, Mr. Guidone, that you had four engine turbo-prop Electras coming into Tweed-New Haven on a regular basis? A. That's correct.

Q. From April of 1967 on? A. If you say so. I don't know the exact time. I know there was aircraft coming in in February or March of '67. There was Eastern and Allegheny coming in.

Q. But you didn't take notes about those? A. Just observations.

Q. And in fact, as the result of making the observations later that you wrote down, you found out that these planes were operating regularly on a particular localized flight path? A. Flight path?

Q. They stuck pretty much to the same path, didn't they? A. No. No. I would never say the same path. They varied, especially Allegheny. At one time we never knew which way they were coming. As a matter of fact, we had considerable trouble there with Allegheny at one time with their approaches and the way they were circling, coming in.

Q. About how many written notations did you make? A. Oh, a hundred or so.

Q. And most of them, I understand, you threw away, is that right? A. Yes, because it's all repetitious. I mean, it pertains to low flying aircraft, and particular airlines coming in. There were certain things that we suffered, and it is just a question of different dates and different time elements, but it generally consists of the same thing in all cases. So, it is just repetition.

If you want to talk about phone calls, if I called once, I called a dozen times. It would always be the same story.

Q. As to the approaches made by these planes landing at the airport, they were coming in pretty much in your opinion low near your house, but in about the same location when they got on the approach? A. On the landing, that's correct. It was either directly over my home, or to the front, or to the back of my house.

Q. Were they further away from your house when they took off? A. The jet takes off straight up. He comes directly over my house. This is where you get the vibration and the fumes.

Q. But the distance of the plane from your house is greater, is it not? A. The overhead distance taking off is always greater, yes, * * *

EXCERPTS OF TESTIMONY OF ANNA AUDETTE

* * * It should be only her husband.

The Court. I am going to take her testimony as bearing on the issue of what the conditions are there. There is no claim being made here for any damages on her part, but she is a competent witness to testify as to what the conditions are. The pre-trial order lists among the plaintiffs' witnesses all the plaintiffs and their respective spouses, and this appears to be a respective spouse.

Mr. Beckman. Yes, sir. I would respectfully observe, your Honor, that livability is a very subjective reaction, and Mr. DeMayo, is asking for that kind of evidence from Mrs. Audette, which I think has no place in this courtroom.

The Court. Overruled.

Q. I think I asked you, Mrs. Audette, what actual damage you observed on your property? A. On our property, at this time in 1967, on November 4 an Eastern Airlines' plane came in at about 7:00 o'clock in the morning. It was the one that was due at 6:34. It came in with a typically deafening noise, and the window in our bedroom broke. We were still — well, it was the difference of being asleep and being awake. The second instance —.

Q. Would you continue if you have any others? A. Yes. The second instance was on December 23rd of the same year. At 2:31 in the afternoon another Eastern plane came over, and I was seated in my studio, and the skylights of my studio broke.

Q. You refer to your studio. Could you tell us briefly what that consists of, and what type of activity you conduct there? A. Yes. It is a building that is 16 by 36 in size. It has a large skylight on the southern side, and I use this to — well, in my profession as a print maker, which is associated with my teaching at Southern Connecticut State College.

The Court. What kind of prints do you make?

The Witness. Primarily etchings.

Q. Is this a studio that was renovated or improved since you acquired the property? A. It was. It was built since we acquired the property.

Q. Totally built? A. Yes.

Q. And added to the property you purchased then? A. That's correct.

Q. From time to time, since the two episodes that you have related to us, have you made notes as a result of particularly disturbing episodes involving flights in close proximity to your house? A. Yes. I have.

Q. And would you require them to be able to answer any questions as to dates and the occurrences? A. Yes. I would like to be able to use them.

Q. Would you take them chronologically, and excluding anything that could be considered an ordinary occurrence, will you just give us some of the episodes that you feel were unusual in their impact, and you may refer to your notes, but please do not read from them. A. Right. I must say first that these notes pertain almost, or really entirely to the last month or month and a half, because I was away from our house for the better part of this last summer. So, my first notation occurs on September 2nd of this year, where I noted that a jet went over my studio at 2:50 p.m. It was a warm day, and I had both doors open. The windows do not open readily, so I had the doors open for ventilation. Besides the usual noise, there occurred a terrific downdraft which blew all my drawings about in the studio, and this caused some concern to me, because they are made with graphite, which is a loose substance, and it had not been fixed yet with a fixative, so that this gave me quite some problem.

Q. The next one? A. The next one was the next day on September 3rd, 3:09 p.m. A jet took off over our house with an absolutely deafening noise.

Q. Were you in any position to estimate the height at which they passed over your property, first in approaching the runway to land. Only if you can estimate.

Mr. Murphy. I think I will object to the form of that question. I don't think she said yet that they do pass over the property.

The Court. Sustained.

Q. Isn't it a fact, Mrs. Audette, that your house is on a direct line with the north-south runway? A. Yes, sir.

Mr. Murphy. Objected to as to form, your Honor. It is leading.

The Court. I'll allow it. The map certainly indicates that to me.

Mr. DeMayo. It indicates it to me, too.

Q. Isn't that a fact? A. Yes. That is true.

Q. And isn't it also a fact that the planes landing on the north-south runway, from south to north, pass either directly, or almost directly over your house? A. That is correct.

Q. Now, with respect to my previous question, are you in a position to estimate the height above your property at which these planes pass? A. I would say roughly, yes. I certainly have watched them many times from outside the house, and I would say that if one were to double the height of the house, one would be not far below one of those planes. So, our house is probably 35 feet high. I would say 40 to 50 feet high.

Q. Above the house? A. Coming in.

Q. Now, how about on departure? A. On departure they are somewhat higher.

Q. Do you still receive the noise that you described when they depart? A. Very definitely.

Q. But is it fair to say that it is less on departure than on arrival? A. No. It is — curiously enough, the height factor does not seem to be directly — I don't think there is all that much difference in the height factor, and the noise is not affected by this difference.

Q. I see. A. I think the quality of the noise makes a lot of difference here, and the quality of the noise on take-off is different from that of landing.

Q. Now, again referring to the memorandum that you have, do you have any other episodes? A. Yes. I do.

Q. Altogether, how many episodes have you noted? A. In the period of time between September 2nd and today, I have ten outstanding episodes.

Q. Well, rather than burden the Court with a recitation of all of them, would you pick out what you feel to be particularly upsetting episodes, and continue chronologically? A. On September 8, a jet passed over our house at 9:50 p.m. and for some reason the windows were caused to rattle rather more than usual.

On October 14, I experienced a phenomena that occurs occasionally, but not regularly, and that is that after the plane has gone over the house, there are certain rather eerie noises that follow it, I guess the result of some air disturbance. They are rather hard to characterize. They are not immediately associated with the plane, but rather with the air disturbances that come shortly thereafter.

All I can say is that they are eerie.

Also, yesterday afternoon — I just happened to recall this with particular clarity — I did not sleep well the night before, and I decided at 4:15 to take a nap, feeling fairly certain that the Eastern plane had left somewhere in the vicinity of 3:00, and that I, therefore, could get some rest. At 4:30 an Eastern plane took off over our house with an absolutely deafening roar, and the nap was terminated.

Q. Do these planes maintain a regular schedule of arrival and departures? A. No, they do not.

Q. Have we now exhausted those episodes which you feel are particularly noteworthy, and worth calling to the attention of the Court? A. I would say so, yes. The rest just pertain to excessive noise.

Q. Is there any other items of physical damage that you can recall associated with your property? A. Yes. There are two things that happened this year. Unfortunately I cannot give you precise dates for them because they — well, let me explain how they occurred, and I think that will explain why I can't give the precise date. We repaired a wall in our house last winter. The repair was to cover up a crack that existed between an interior wall and an exterior one, that was our western wall. This repair held perfectly well through the spring, during a time of climatic change. Nothing happened. In the middle of the summer, after the advent or the resumption of jet service at the airport, the crack had opened again, and I cannot think of anything else that would have opened up this crack.

Also, on the same wall where the window broke in 1967, another window broke in almost an identical fashion. Again, I would associate that with the jet traffic.

Mr. DeMayo. Thank you, Mrs. Audette. I have nothing further at this time.

Mr. Beckman. I respectfully request — excuse me, your Honor — that the testimony of Mrs. Audette relating to her personal reaction such as being awakened from a nap be stricken as related to her own reaction.

The Court. Denied.

Cross-examination by Mr. Murphy:

Q. Mrs. Audette, you did understand at the time you received that list of aircraft schedules, prior to purchasing the property, that turbo-prop aircraft were operating, did you not? A. Yes. I did. But not four engines ones.

Q. And you were aware, were you not, that the flight * * *